Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 74-54

TRANSAMERICAN FREIGHT LINES, INC.,
Petitioner,

vs.

BRADA MILLER FREIGHT SYSTEMS, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. .....

SANDRA WEAR,

vs.

BRADA MILLER FREIGHT SYSTEMS, INC.,
Respondent,

and

TRANSAMERICAN FREIGHT LINES, INC.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

Transamerican Freight Lines, Inc. hereby petitions this Court to grant it a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit entered May 6, 1974 in this cause, on the ground that this decision is in direct conflict with the decisions rendered by the United States Courts of Appeals for the Fifth Circuit and

for the Fourth Circuit and on the grounds that the decision of the Seventh Circuit in this case erroneously interprets and construes certain sections of the Interstate Commerce Act and certain regulations of the Interstate Commerce Commission.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Illinois, Southern Division, in *Sandra Wear v. Brada Miller Freight Systems, Inc., and Transamerican Freight Lines, Inc.*, Civil Action number 4289, is not reported. A true copy of the same and of the order of that Court entered in conjunction with its opinion are appended hereto as Appendix A. The opinion of the United States Court of Appeals for the Seventh Circuit in *Sandra Wear v. Transamerican Freight Lines, Inc., Defendant-Appellant and Brada Miller Freight Systems, Inc., Defendant-Appellee*, number 73-1773, is not yet reported. A true copy of that opinion is appended hereto as Appendix B. The opinion of the United States Court of Appeals for the Fifth Circuit in *Allstate Insurance Company v. Alterman Transport Lines, Inc.* is reported at 465 F. 2nd 710. A true copy of this opinion is appended hereto as Appendix C. The opinion of the United States Court of Appeals for the Fourth Circuit in *Carolina Freight Carriers Corporation v. Pitt County Transportation Company* is reported at 492 F. 2nd 243. A true copy of this opinion is appended hereto as Appendix D.

JURISDICTION

Transamerican Freight Lines, Inc. appealed this case to the United States Court of Appeals for the Seventh Circuit from an order of the District Court granting a motion for Summary Judgment to Brada Miller Freight Systems, Inc. on Transamerican's cross-claim against Brada. It is the decision of the Court

of Appeals affirming the District Courts' order granting summary judgment which is sought to be reviewed here. That decision was entered in the case of *Sandra Wear v. Brada Miller Freight Systems, Inc. et al.*, on May 6, 1974, by the United States Court of Appeals for the Seventh Circuit. This petition is being filed within ninety (90) days of the entry of such judgment pursuant to 28 U.S.C. § 2101(c).

The jurisdiction of this Court to review the judgment and decision in this case by writ of certiorari is conferred by 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

In a case involving an agreement between two carriers for the lease of a tractor and trailer from one carrier to the other for a single trip, where the lease complies with the I.C.C. regulations and where the lessee assumes control and responsibility for the tractor and trailer involved according to I.C.C. regulations, is an indemnity clause in this otherwise valid lease invalid as against public policy and in circumvention of the I.C.C. regulations as held by the United States Court of Appeals for the Seventh Circuit in its opinion in *Sandra Wear v. Brada Miller Freight Systems, Inc. et al.*, not yet reported, or is this indemnity clause a valid exercise of the right of the parties to freedom of contract as held by the United States Court of Appeals for the Fifth Circuit in the case of *Allstate Insurance Company v. Alterman Transport Lines, Inc.*, 465 F. 2nd 710, and as held by the United States Court of Appeals for the Fourth Circuit in the case of *Carolina Freight Carriers Corporation v. Pitt County Transportation Company*, 492 F. 2nd 243.

STATUTES AND REGULATIONS INVOLVED

Statutes:

Interstate Commerce Act:

Section 304(e), 49 U.S.C. § 304(e):

(e) Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

Vol. 10, United States Code (1970 ed.), pp. 11942.

Regulations:

Interstate Commerce Commission Regulations:

Section 1057.3(a), 49 C.F.R. § 1057.3(a):

The provisions of § 1057.4, except paragraphs (c) and (d), relative to inspection and identification of equipment, shall not apply:

(a) *Equipment used in the direction of a point which lessor is authorized to serve.* To equipment owned or held under a lease of 30 days or more by an authorized carrier and regularly used by it in the service authorized, and leased by it to another authorized carrier for transportation in the direction of a point which lessor is authorized to serve: *Provided,* That the two carriers have first agreed in writing that control and responsibility for the operation of the equipment shall be that of the lessee from the time the equipment passes the inspection required to be made by lessee or its representative under § 1057.4(c) until such time as the lessor or its representative shall give to the lessee or its representative a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is retaken or until such time as the required inspection is completed by another authorized carrier taking possession of the equipment in an interchange of equipment where such use is contemplated, such writing to be signed by the parties or their duly authorized regular employees or agents, and a copy thereof carried in the equipment while the equipment is in the possession of the lessee.

Title 49, Code of Federal Regulations, Chapter 10, Part 1057, Volume effective 10-1-73, Published by Office of Federal Register, G.S.A. pp. 138.

Section 1057.4(a)(4), 49 C.F.R. § 1057.4(a)(4):

Other than equipment exchanged between motor common carriers in interchange service as defined in § 1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:

(4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except: (exceptions not pertinent.)

Title 49, Code of Federal Regulations, Chapter 10, Part 1057, Volume effective 10-1-73, Published by Office of Federal Register, G.S.A. pp. 138 and 139.

STATEMENT OF THE CASE

This case was originally instituted by Sandra Wear to recover damages for injuries she received in a truck-car collision on January 22, 1968. She filed her action against Brada Miller Freight Systems, Inc. (hereafter Brada), and Transamerican Freight Lines, Inc. (hereafter Transamerican), which defendants then cross-claimed against each other. Ultimately plaintiff dismissed her case against Brada and proceeded to trial against Transamerican during the course of which trial plaintiff and Transamerican effectuated a settlement of plaintiff's case. Thereafter Transamerican amended its cross-claim against Brada to plead the settlement and by the cross-claim sought recovery from Brada of the amount of the settlement plus expenses by virtue of an indemnification clause in a truck lease agreement between Brada (lessor) and Transamerican (lessee).

The District Court granted Brada's motion for Summary Judgment on the ground that the indemnity clause contained in the lease contract by the parties violated the Interstate Commerce Commission (I.C.C.) regulations 49 C.F.R. § 1057.4(a)(4) [1057.3(a)]. This judgment was affirmed by the Court of Appeals.

The case found its way into Federal Court through removal by the defendants from the state court where it had been originally filed by plaintiff Sandra Wear. Federal Court jurisdiction was invoked by defendants because of diversity of citizenship (plaintiff was a resident of the state of Illinois: Brada was an Indiana corporation where it also had its principal place of business and Transamerican was incorporated in the state of Michigan with its principal place of business in that state). Plaintiff sought damages in the amount of $250,000.00 (later amended to $500,000.00) thus creating an amount in dispute which exceeded the sum of $10,000.00 exclusive of interest and costs.

The facts of this case have been established in the record by numerous depositions, affidavits and exhibits.

For our purposes, the story starts January 19, 1968, at which time a lease agreement was entered into by which Brada leased a tractor and trailer to Transamerican for a single trip from Detroit, Michigan to Kansas City, Missouri. It was represented by Brada in the lease that this was a trip in the direction of a point which Brada was authorized to serve. Additionally, the lease provided that Transamerican, during the term of the lease, should have control and responsibility for the operation of the leased equipment. The vehicle was operated during the term of the lease by Howard Hardrick, a full-time driver and employee of Brada. Hardwick was furnished by Brada to Transamerican for the term of the lease although continuing as Brada's employee.

Extensive evidence contained in the record establishes that Transamerican meticulously followed the leasing requirements of the I.C.C. regulations and establishes that during the term of the lease Transamerican in fact had complete control and responsibility of the truck and driver. These contentions were urged by Transamerican and conceded by Brada in the District Court. The District Court in its opinion stated: "Transamerican contends that in the present case it had complete control and responsibility for the tractor and trailer covered by the lease, and Brada Miller does not dispute this contention for purposes of this hearing".

Paragraph 9 of the Lease Agreement contained an indemnity clause by which Brada agreed to indemnify Transamerican from certain losses arising out of the equipment lease. This paragraph concludes with the sentence "Nothing is this paragraph 9 contained shall be construed to in anywise limit the liability of [Transamerican] to the public in connection with the use of said equipment under this agreement".

Following the accident, which occurred during the term of the subject lease, Sandra Wear filed her lawsuit against Brada and Transamerican alleging in her first amended complaint that she suffered injuries as a result of negligence on the part of the driver of the tractor trailer unit. Plaintiff later dismissed her case against Brada. Plaintiff proceeded to trial on her case against Transamerican during the course of which trial a settlement agreement was reached whereby Transamerican paid to plaintiff the sum of $80,000.00. It is the amount of this settlement in addition to its costs and expenses which Transamerican is now seeking to recover from Brada by virtue of the indemnity clause in the lease.

For the purpose of brevity and in order not to unduly burden this Court, evidentiary detail supporting this concise statement of the facts has been omitted.

ARGUMENT

This Court is being asked to grant a writ of certiorari herein in order to resolve a direct conflict between the decision of the United States Court of Appeals for the Seventh Circuit in our present case (Appendix B) and recent decisions of the United States Courts of Appeals for the Fifth Circuit and for the Fourth Circuit in cases involving similar facts. (Appendixes C and D).

The decisions involved construe the regulations of the Interstate Commerce Commission which control the lease and interchange of vehicles and equipment between motor carriers. The decisions of the Seventh Circuit on the one hand and of the Fourth and Fifth Circuits on the other hand are diametrically opposed to each other without possibility of reconcilation other than by a decision by this Court.

Specifically, the issue involves the validity of an indemnity clause contained in the lease agreement by which the lessor of the tractor and trailer agreed to indemnify lessee from certain losses.

The I.C.C. regulations provide as to certain leases that the leasing carriers must agree "in writing that control and responsibility for the operation of the equipment shall be that of the lessee * * *" 49 C.F.R. 1057.3(a). As to other types of leases, the regulations provide that the lease "shall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee * * *" 49 C.F.R. 1057.4(a)(4).

It is the construction of this language which has left the Seventh Circuit in conflict with the Fourth and Fifth Circuits.

On this issue, the decision of the Seventh Circuit in our present case holds that an indemnity clause itself in a truck lease agreement by attempting to shift potential financial burden

from the lessee, violates the I.C.C. regulations with respect to control and responsibility and is invalid. This is held to be true even though the facts otherwise show complete compliance with the I.C.C. regulations and show that actual control and responsibility is in fact with the lessee.

In conflict with this, the Fourth and Fifth Circuits have each rendered decisions upholding the validity of an indemnity clause in a lease which otherwise complies with the I.C.C. regulations on the subject.

The subject initially came before the Seventh Circuit in the case of *Alford v. Major* (7th Circ. 1972), 470 F. 2nd 132. In that case two carriers entered into a trip lease agreement by which the lessor indemnified lessee against certain losses. The Court held that this indemnity clause was against public policy and was in violation of 49 C.F.R. § 1057.4(a)(4).

By the time the case of *Allstate Insurance Company v. Alterman Transport Lines, Inc.* (5th Circ. 1972), 465 F. 2nd 710 had reached the 5th Circuit, the *Alford* case had been decided in the District Court and the 5th Circuit opinion considers the *Alford* District Court decision (*Alford v. Major*, 314 F.Supp. 979), distinguishing it.

The decision of the 5th Circuit in the *Allstate* case states "* * * we find nothing in the language of 49 C.F.R. § 1057.4 (a)(4) which would prohibit two freely contracting parties from determining, as between themselves, which party will ultimately bear the cost of damages done to a third person. The only conceivable argument against such an arrangement would be that the regulation seeks to prevent indemnification on the theory that a trucking company, knowing it does not have to pay damages, might tend to be less careful in supervising and controlling the actions of its truck drivers. However, the same can be said of insurance coverage which the regulations ob-

viously do not prohibit. We are of the opinion that had the I.C.C. intended to prevent indemnification between trucking companies it would have said so in precise terms". *Allstate v. Alterman*, 465 F. 2nd l.c. 713.

Further in its opinion in *Allstate*, the Fifth Circuit validly distinguishes the facts in *Alford* pointing out that "in Alford there was a prima facie violation of 49 C.F.R. § 1057.4(a)(4) because the lessee allowed the lessor to retain full control over the truck and driver during the term of the lease." 465 F. 2nd l.c. 714.

On the other hand, in the *Allstate* case the lessee had in fact assumed control of the leased equipment. The reasons which existed in *Alford* for invalidating the lease (lack of actual control by lessee) were not found in *Allstate*. The Fifth Circuit thus held that where the I.C.C. regulations were otherwise complied with an indemnity clause in the lease agreement would be upheld.

Subsequent to the decision in *Allstate* the Seventh Circuit rendered its decision in *Alford*. However, that decision makes no mention of the *Allstate* decision and does not consider it.

Chronologically, the next event in the sequence of the consideration of this subject by the United States Courts of Appeals occurs in the decision of the Fourth Circuit in the case of *Carolina Freight Carriers Corporaton v. Pitt County Transportation Company*, 492 F. 2nd 243. This decision was rendered February 21, 1974 and by it the Fourth Circuit reversed the District Court judgment. The District Court in *Carolina Freight Carriers Corporation v. Pitt County Transportation Company*, 358 F. Supp. 1177, in granting summary judgment to defendant had followed the decision of the Seventh Circuit in the *Alford* case and held that the indemnity clause was invalid.

In its decision in the *Carolina Freight Carriers* case, 492 F. 2nd 243, the Fourth Circuit agreed with the decision of the

Fifth Circuit in *Allstate* and stated "Nor do we find the indemnification provision violative of either the spirit or letter of the I.C.C. regulation." 492 F. 2nd, l.c. 246.

The Fourth Circuit concurred with the distinction the Fifth Circuit had made of the *Alford* case for the reason that in *Alford* the lessor had, in fact, retained full custody and control over the truck and driver in a prima facie violation of the regulations.

In its decision in our present case the Seventh Circuit has stated, "We do not agree that *Alford* can be distinguished from *Alterman*.[5] The Fifth Circuit determined that 49 C.F.R. § 1057.4(a)(4) did not prohibit the parties from determining between themselves which party would bear the costs. The District Court in *Alford* expressly rejected this interpretation (*see* n. 2, *supra*) and our affirmance specifically recognized that the indemnity clause itself circumvents the regulations." *Wear v. Brada Miller Freight Lines, et al.* (7th Circ.), Number 73-1773, decided May 6, 1974, not yet reported (Appendix B).

Thus, in our present case as shown by the evidence and conceded by the parties, we have a factual situation which shows actual control and responsibility for the leased equipment to be with the lessee. The decisions of the Fourth and Fifth Circuits in the *Carolina Freight Carriers* and the *Allstate* cases show that these Courts would uphold the validity of the indemnity clause in our present case because our case is distinguishable from the *Alford* case in the same manner as the distinctions made in the *Carolina Freight Carriers* and the *Allstate* cases.

In conflict with this, the Seventh Circuit now states in *Wear* that the *Alford* case cannot be distinguished from the *Allstate* case but that instead any indemnity clause in a lease of this type will be invalid regardless of compliance with the I.C.C. regulations.

The problems created are not unique to the cases immediately involved and cited in petitioner's argument herein. Instead,

the situation arises frequently in the trucking industry. Many times daily across the country leases of trucking equipment are signed. Under the present state of the law we find lessors and lessees of trucking equipment unable to ascertain their rights and relationships with each other. The rights of the parties and the affect of the regulations of the Interstate Commerce Commission will vary and fluctuate depending upon which jurisdiction is determining these rights and interpreting the regulations.

The trucking industry could not adequately and orderly move freight and cargo across our country to sustain our economy without the ability to exchange equipment where necessary. The national policy on this subject is established by the Interstate Commerce Commission in its regulations and the conflicts between the Circuits in interpretation of this policy has left a confusion in the industry.

There have been a number of decisions on this subject from different jurisdictions. Several of these are cited in the cases referred to herein. These cases help demonstrate to an extent the frequency with which this problem arises.

It can be seen that the decisions in the *Alford* and the *Allstate* cases have each had their impact upon the law on this subject. For example, the decision in the *Alford* case has been followed and relied upon by the Supreme Court of Nebraska in the case of *Denver Midwest Motor Freight, Inc. v. Busboom Truck, Inc.*, 190 Neb. 231, 207 NW 2nd 368 (1973) and by the District Court for the Eastern District of Virginia in the case of *Carolina Freight Carriers Corporation v. Pitt County Transportation Company*, 358 F. Supp 1177. On the other hand, the *Allstate* case has been followed by the Fourth Circuit in its decision in *Carolina Freight Carriers Corporation v. Pitt County Transportation Company*, 492 F. 2nd 243. Given more time without intervention and guidance by this Court, the conflict on this subject will spread adding further confusion as

various other courts by their decisions place themselves behind either the Seventh Circuit and the *Alford* case or the Fifth Circuit and the *Allstate* case.

CONCLUSION

It is respectfully submitted that because of the clear conflict between the decisions of the Courts of Appeals leaving confusion on a subject of great importance to the nation's trucking industry, the within petition for a writ of certiorari should be granted so that the decision of the Seventh Circuit Court of Appeals can be reviewed and a definitive decision rendered by this Court.

Respectfully submitted

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APPENDIX

APPENDIX A

In the United States District Court for the Southern District of Illinois, Southern Division

Sandra Wear,
Plaintiff,
vs.
Brada Miller Freight System, Inc., and Transamerican Freight Lines, Inc.,
Defendants.
Civil No. 4289

Opinion

(Filed Apr. 25, 1973)

This cause came before the Court on the Motion of Defendant Brada Miller Freight System, Inc., for Summary Judgment. In this action, Transamerican Freight Lines, Inc. (Transamerican), by its Amended Crossclaim, seeks to recover from Brada Miller Freight System, Inc. (Brada Miller), the amount paid by Transamerican to settle plaintiff's claim.

Transamerican alleges that on January 18, 1968, Brada Miller entered into a lease agreement whereby Brada Miller leased a tractor and trailer to Transamerican for a single trip from Detroit, Michian to Kansas City, Missouri. On January 22, 1968 the Plaintiff Sandra Wear was injured when her automobile was struck by the leased vehicle. Transamerican further alleges that at the time of the accident the tractor and trailer was being driven under the lease agreement by an "agent, servant and employee" of Brada Miller. The tractor and trailer was being operated at the time under an Interstate Commerce Com-

mission permit held by Transamerican. Transamerican settled the plaintiff's injury claim by a payment to plaintiff of $80,000.00.

The lease agreement contained the following indemnity provision:

> "It is mutually understood and agreed by and between the parties hereto that First Party (Transamerican Freight Lines, Inc.) shall not be responsible to Second Party (Brada Miller Freight System, Inc.), its agents, servants and employees, for any negligence of the Second Party, its agents, servants or employees, or for any loss, damage, injury or expense arising out of the failure of Second Party to carry out the terms of this agreement. Second Party hereby agrees to indemnify and save harmless First Party from any and all claims, suits, losses, fines, or other expenses arising out of, based upon, or incurred because of injury to any person or persons, or damage to property sustained or which may be alleged to have been sustained by reason of any negligence or alleged negligence on the part of Second Party, its agents, servants, or employees, and for any loss or damage to cargo resulting from any negligence or unlawful act of Second Party, his agents, servants and employees. It is mutually understood and agreed that Second Party will defend at his own expense and cost, any and all suits that may be brought against First Party for injuries sustained, including death resulting therefrom, or damage to property caused or alleged to have been caused by the negligence of any person employed by Second Party, while engaged in the performance of any of the work required by the terms and conditions of this agreement, and for any cargo loss sustained resulting from any negligence or unlawful act on the part of Second Party, his agents, servants, and employees."

Relying on the above indemnity provision, Transamerican now seeks to recover from Brada Miller the amount Transamerican paid to plaintiff plus expenses.

The lease agreement referred to in Transamerican's Amended Crossclaim was governed by the following provision of the Interstate Commerce Act:

> (e) . . . the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles, not owned by them, in the furnishing of transportation of property
>
> > (2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles . . . 49 USC 304(e) (1958).

Pursuant to such delegation of authority the ICC enacted regulations governing these matters.

> 49 C.F.R., Section 1057.4 . . . authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:
>
> > (a) *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:
> >
> > > (4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except: (exceptions not pertinent).

In a very recent case decided by the U. S. Court of Appeals for the 7th Circuit, Alford v. Major, 470 F2d 132 (1972), the Court was faced with a fact situation almost identical to this case. In Alford, Major Truck Lines (Major) leased a truck

and driver from Carriers, Inc. (Carriers) under a trip lease which provided that Carriers was to indemnify Major from losses suffered by Major because of third party claims brought against Major as a result of the negligence of the driver furnished by Carriers. Plaintiff was killed in an accident caused by the negligence of the truck driver. The wrongful death action was settled by Major which sought to recover from Carriers under the indemnity provision of the trip lease. In denying recovery, the Court stated:

> l.c. 135 "Therefore, since the indemnification clause would permit Major to circumvent the regulations' requirement that leased carriers exert actual control over the leased equipment and the borrowed drivers, we find that the indemnification clause is unenforceable."

Because of Alford v. Major, the Court holds the indemnity provision of the lease agreement in the present case violates the provisions of 49 C.F.R., Section 1057.4 and is unenforceable.

Transamerican in its brief has cited the recent case of Allstate Insurance Company v. Alterman Transport Lines, Inc., 465 F2d 710 (5th Circuit) which upheld an indemnity agreement between two trucking companies. Transamerican contends that in the present case it had complete control and responsibility for the tractor and trailer covered by the lease, and Brada Miller does not dispute this contention for purposes of this hearing. Transamerican contends that this fact brings this case within the holding of Allstate v. Alterman.

The indemnity agreement in Allstate v. Alterman however did not contain the provision providing for indemnity because of the negligence of the "agents, servants and employees" of the lessor as in the present case. Alford v. Major has condemned the type of indemnity agreement sought to be enforced in this case and thus can be distinguished from Allstate v. Alterman.

The Court finds that pleadings, answers to interrogatories and motion show that there is no genuine issue as to any material

fact, and that the Defendant Brada Miller is entitled to a judgment as a matter of law.

Accordingly, on the authority of Alford v. Major, 470 F2d 132, the Motion of Brada Miller for Summary Judgment is hereby GRANTED.

Entered this 25th day of April, 1973.

/s/ OMER POOS
United States District Judge

In the United States District Court
for the Southern District of Illinois
Southern Division

Sandra Wear,
Plaintiff,
vs.
Brada Miller Freight System, Inc., and Transamerican Freight Lines, Inc.,
Defendants.
} Civil No. 4289.

Order

The Court, having filed an Opinion in the above entitled cause, and having been fully advised in the premises, and after having carefully considered the records and files herein, hereby ORDERS, ADJUDGES AND DECREES that the Motion for Summary Judgment of Defendant, Brada Miller Freight System, Inc., be, and the same is hereby granted.

Entered this 25th day of April, 1973.

/s/ OMER POOS
United States District Judge

APPENDIX B

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

Argued April 25, 1974

Decided May 6, 1974

before

Hon. Latham Castle, Senior Circuit Judge

Hon. Robert A. Sprecher, Circuit Judge

Hon. Gus J. Solomon, Senior District Judge*

Sandra Wear, Plaintiff, vs. Transamerican Freight Lines, Inc., Defendant-Appellant and Brada Miller Freight Systems, Inc., Defendant-Appellee.	Appeal from the United States District Court for the Southern District of Illinois, Southern Division. No. 68 C 271 Omer Poos, Judge.

No. 73-1773

Order

"Unpublished Order" not to be cited, per Circuit Rule 28

This case is before this court on appeal by defendant-appellant, Transamerican Freight Lines, Inc. (Transamerican), from an order of the district court entered April 25, 1973 granting the motion of defendant-appellee, Brada Miller Freight Systems, Inc. (Brada Miller), for summary judgment. We affirm.

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* Senior District Judge Gus J. Solomon of the District of Oregon is sitting by designation.

I

On January 19, 1968 Brada Miller entered into a lease agreement whereby it leased a tractor and trailer to Transamerican for a single trip from Detroit, Michigan to Kansas City, Missouri. Transamerican inspected the equipment before the trip and made a vehicle inspection report as required by the Interstate Commerce Commission. The driver, Harold L. Hardrick, normally employed by Brada Miller, was "furnished" by Brada for the trip. Transamerican, among other things, checked Hardrick's medical certificate, advanced money to him for expenses during the trip, and instructed him to follow the route certified pursuant to Transamerican's I.C.C. authority.

During the trip, plaintiff Sandra Wear was injured when her automobile was struck by this leased vehicle being operated under Transamerican's I.C.C. permit. Hardrick reported the accident to Transamerican who thereafter reported the accident to the I.C.C. pursuant to I.C.C. regulations.

Plaintiff Wear filed suit against Brada Miller and Transamerican; these defendants each cross-claimed. Ultimately plaintiff dismissed her case against Brada Miller and proceeded to trial against Transamerican. During the course of trial, plaintiff and Transamerican reached a settlement agreement providing for payment of $80,000 to plaintiff. Thereafter Transamerican amended its cross-claim against Brada Miller to plead the settlement, seeking recovery of the settlement amount plus expenses from Brada Miller under an indemnification clause in the lease agreement. The indemnity provision provided that:

> "It is mutually understood and agreed by and between the parties hereto that First Party [Transamerican Freight Lines, Inc.] shall not be responsible to Second Party [Brada Miller Freight System, Inc.], its agents, servants and employees, for any negligence of the Second Party, its agents, servants or employees, or for any loss, damage, in-

jury or expense arising out of the failure of Second Party to carry out the terms of this agreement. Second Party hereby agrees to indemnify and save harmless First Party from any and all claims, suits, losses, fines, or other expenses arising out of, based upon, or incurred because of injury to any person or persons, or damage to property sustained or which may be alleged to have been sustained by reason of any negligence or alleged negligence on the part of Second Party, its agents, servants, or employees, and for any loss or damage to cargo resulting from any negligence or unlawful act of Second party, his agents, servants and employees. It is mutually understood and agreed that Second Party will defend at his own expense and cost, any and all suits that may be brought against First Party for injuries sustained, including death resulting therefrom, or damage to property caused or alleged to have been caused by the negligence of any person employed by Second Party, while engaged in the performance of any of the work required by the terms and conditions of this agreement, and for any cargo loss sustained resulting from any negligence or unlawful act on the part of Second Party, his agents, servants, and employees."

The district court granted Brada Miller's motion for summary judgment relying on *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972).

II

In *Alford v. Major*, 314 F.Supp. 979 (N.D. Ind. 1970), a third party was injured by a truck being operated under a trip lease wherein the lessor, Carriers, leased a truck along with a driver, to the lessee, Major, to be operated under Major's I.C.C. operating permit. Major cross-claimed against Carriers under an indemnification clause whereby Carriers agreed to indemnify Major against damages to persons or property "resulting from negligence of lessor or his driver." 314 F.Supp. at 981. Major claimed that "the actual care, custody and control of the truck remained with the lessor even though the lessee legally assumed the full responsibility therefor to the general public . . ." and therefore, since its liability was predicated solely on its nondelegable duty to the public, it was entitled to indemnification from Carriers whose agent's wrongdoing was the actual cause of the injury. 314 F.Supp. at 982.

The district court found that if the agreement placed the control of the truck and driver in Carriers, this resulted in a violation of the Interstate Commerce Act, 49 U.S.C. § 304(e),[1] which established a public policy against delegation *per se*. Rejecting the reasoning of *Newsome v. Surratt*, 237 N.C. 297, 74

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[1] "(e) . . . the Commission is authorized to prescribe, with respect to the use of motor carriers (under leases, contracts, or other arrangements) of motor vehicles, not owned by them, in the furnishing of transportation of property

> (2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles . . ."

49 U.S.C. § 304(e).

The regulations enacted by the I.C. pursuant to this authority include:

> "49 C.F.R., Section 1057.4 . . . authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:
>
> (a) *Contract requirements.* The contract, lease, other arrangement for the use of such equipment:
>
> (4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except:
>
> (exceptions not pertinent)."

S.E.2d 732 (1953),[2] because of this policy against delegation. the district court concluded:

> "In the opinion of this Court, the main purpose of the statute was to ensure that all interstate operations would be supervised directly by persons familiar with federal safety regulations and amenable to the jurisdiction of the Interstate Commerce Commission. In other words, the intent was to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers. The Interstate Commerce Act was supposed to prevent accidents, as well as to provide financially responsible defendants in the event of their occurrence. And that end could best be achieved if the carriers themselves exerted actual control over leased equipment."

This court affirmed the district court, *Alford v. Major*, 470 F.2d 132 (1972).

> "[A]s the district court held, 'the intent [of the regulations] was to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers.'
>
> . . . [S]ince the indemnification clause would permit Major [lessee] to circumvent the regulations' requirement that leased carriers exert actual control over the leased

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[2] In *Newsome v. Surratt*, the North Carolina Supreme Court, on nearly identical facts, allowed indemnification on the basis that "the duty imposed by law with respect to third parties in no way interfered with the right of the lessor to agree to indemnify the lessee for any loss it might sustain as a result of the negligence, incompetence or dishonesty of any driver which the lessor might furnish to operate the leased truck." 74 S.E.2d at ....

Newsome v. Surratt was likewise rejected in *Carolina Freight Carriers Corp. v. Pitt County Transportation Co.*, 358 F.Supp. 1177, 1179-80 (E.D. Va. 1973).

> equipment and the borrowed drivers, we find that the indemnification clause is unenforceable. See *Carriers Insurance Exchange v. Truck Insurance Exchange*, 310 F.2d 653 (4th Cir. 1972)."

470 F.2d at 135.

Transamerican argued that *Alford* is not applicable to it because here the lessee meticulously followed the I.C.C. regulations and, contrary to the *Alford* case, had assumed complete control over and responsibility for the tractor and trailer covered by the lease.[3] Transamerican relies on *Allstate Insurance Co. v. Alterman Transport Lines, Inc.*, 465 F.2d 710 (5th Cir. 1972) (Alterman) which enforced an indemnity clause in a situation like the one at bar.[4] The Fifth Circuit held that as long as the lessee assumed full common carrier responsibility for the operation of the leased vehicle (including responsibility for the quality of the maintenance), there is "nothing in the language of 49 C.F.R. § 1057.4(a)(4) which would prohibit two freely con-

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[3] Paragraph 4 of the trip lease recites the following:

> "It is mutually understood and agreed, that the first party [Transamerican] during the terms of this lease shall have the control and responsibility for the operation of said equipment in respect to the public, shippers and Interstate Commerce Commission for such period that said equipment is operated under the terms of this lease as provided in Paragraph 1 hereof.

[4] The trip lease in *Alterman* "[c]ontained . . . a provision by which Consolidated [the lessor] agreed to indemnify Alterman [the lessee] for any damage done to or suffered by the driver or other persons in connection with the operation of the tractor-trailer unit during the term of the lease. The lease also provided that . . . [the lessor] was to be responsible for servicing the vehicle and keeping it in good repair."

* * * * * * *

. . . [T]he lease specifically provided that 'said vehicle shall be solely and exclusively under the direction and control of the lessee [Alterman] who *shall assume full common carrier responsibility* . . . for the operation of such vehicle.' (Emphasis supplied)." 465 F.2d at 712-13.

tracting parties from determining, as between themselves, which party will ultimately bear the cost of damages done to a third party." 465 F.2d at 713. Transamerican urged that we adopt the factual distinctions recognized in *Alterman*:

> "In *Carriers* [*Carriers Ins. Exchange v. Truck Ins. Exchange*, 310 F.2d 653 (4th Cir. 1962)] the indemnification clause was struck down because the two contracting trucking companies violated an I.C.C. safety regulation [49 C.F.R. § 1057.4(c)] and created a dangerous condition which resulted in injury to an innocent third party. In *Alford* [314 F.Supp. 979] there was a *prima facie* violation of 49 C.F.R. § 1057.4(a)(4) because the lessee allowed the lessor to retain full control over the truck and the driver during the term of the lease."

465 F.2d at 713-14.

We do not agree that *Alford* can be distinguished from *Alterman*.[5] The Fifth Circuit determined that 49 C.F.R. § 1057.4 (a)(4) did not prohibit the parties from determining between themselves which party would bear the costs. The district court in *Alford* expressly rejected this interpretation (*see* n. 2, *supra*) and our affirmance specifically recognized that the indemnity clause itself circumvents the regulations.

Transamerican's argument proceeds from the premise that control and cost bearing are not related. We disagree. In *Alford* we interpreted the regulations as requiring the party who has the duty of responsibility and control under 49 U.S.C. § 304(e) to internalize the cost of any breach of this duty. This

[5] Transamerican contends that in *Alford* the parties agreed to place full control in the lessor; apparently, the *Alterman* court assumed this as well. All that is clear from the *Alford* opinions is that the lessee *argued* that control remained in the lessor. In any event, our disposition makes this aspect irrelevant.

forces the lessee to take costs into account in the exercise of such duty.[6]

Accordingly, the judgment of the district court is affirmed. *Accord, Carolina Freight Carriers Corp. v. Pitt County Transportation Co.*, 358 F.Supp. 1177 (E.D. Va. 1973); *Denver Midwest Motor Freight, Inc. v. Busboom Truck, Inc.*, 190 Neb. 231, 207 N.W. 2d 368 (1973).

Affirmed

[6] An insurance arrangement does not affect this principle since over a period of time insurance rates reflect the level of care exercised. The indemnity agreement herein involved, if enforced, would separate control and cost bearing because under Transamerican's argument, the lessee did in fact exercise control. *Contra, Allstate Ins. Co. v. Alterman Transport Lines*, 465 F.2d at 713.

APPENDIX C

Allstate Insurance Company,
Plaintiff-Appellee,

v.

Alterman Transport Lines, Inc.,
Defendant-Appellee-Cross-Appellant,

v.

Consolidated Systems, Inc.,
Defendant-Appellant-Cross-Appellee.

Allstate Insurance Company,
Plaintiff-Appellee-Cross-Appellant,

v.

Alterman Transport Lines, Inc.,
Defendant-Appellee-Cross-Appellant,

v.

Consolidated Systems, Inc.,
Defendant-Appellant-Cross-Appellee.

Nos. 31139, 71-2103.

United States Court of Appeals, Fifth Circuit.

Aug. 30, 1972.

Rehearing Denied Oct. 2, 1972.

465 F.2d 710 (1972)

Before Rives, Bell and Morgan, Circuit Judges.

Lewis R. Morgan, Circuit Judge:

The question presented in this suit for indemnification is which of three parties must ultimately bear the loss for monies

paid out in settlement of a tort claim. The district court held that an insurance policy issued by Allstate Insurance Company did not afford coverage for the injury; that Alterman Transport Lines, Inc., was primarily liable for payment of the tort claim; but that Alterman was entitled to be reimbursed by Consolidated Systems, Inc., due to an indemnification agreement between the two corporations. After considering the various assignments of error, we affirm the final judgment[1] of the district court.

The event which gave rise to this litigation occurred in 1964 on a Florida highway when a tractor-trailer unit driven by Elmer Stewart crashed into the rear of an automobile driven by John Maguire. The tractor-trailer unit was on lease to Alterman from Consolidated for the duration of a single trip from Chicago, Illinois, to Miami, Florida.[2] Contained in the lease was a provision by which Consolidated agreed to indemnify Alterman for any damage done to or suffered by the driver or other persons in connection with the operation of the tractor-trailer unit during the term of the lease. The lease also provided that Consolidated was to be responsible for servicing the vehicle and keeping it in good repair. Consolidated's insurance carrier was Allstate.

After the collision Maguire filed suit for personal injuries in a Florida state court against Consolidated, Alterman, and Elmer Stewart. The state court suit was finally settled for $16,000.00 with Allstate and Alterman each paying half.

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[1] This judgment was entered on September 30, 1970, as opposed to the initial judgment which was entered along with the court's opinion on September 3, 1970.

[2] The reason for the lease was that Consolidated was not authorized under I.C.C. regulations to haul non-exempt commodities in the State of Florida. Consolidated had taken a load of exempt commodities from Florida to Illinois and the lease arrangement allowed Consolidated to return to Florida with a revenue-producing load rather than an empty truck.

Allstate then filed suit in federal district court for a declaratory judgment of liability as between itself, Consolidated, Alterman, and Alterman's alleged insurance carrier, Citizens Casualty Company. The district judge granted summary judgment against Citizens and in favor of Allstate, but on appeal this court reversed and held that Citizens did not afford insurance coverage for the Maguire accident. Consolidated Systems, Inc. v. Allstate Insurance Company, 5 Cir. 1969, 411 F.2d 157. This court then remanded the case so that a complete factual record might be developed concerning the liabilities of the three remaining parties—Alterman, Allstate and Consolidated.

On remand the district court entered findings of fact and conclusions of law, and held that Allstate was entitled to indemnification from Alterman; and that Alterman, in turn, was entitled to indemnification from Consolidated. The district court reached this result by first concluding that Alterman, by virtue of its complete control over the tractor-trailer unit and the driver, was the active tort-feasor and primarily liable for payment of Maguire's personal injury claim. The court next held that Allstate's insurance policy did not cover the damage done to Maguire, and thus, Allstate could collect the amount it paid ($8,000.00) in settlement of the tort claim, plus attorneys' fees expended in the state court action from the primary tort-feasor, Alterman. Allstate was not awarded recovery of attorneys' fees for prosecution of the federal suit. However, since Alterman and Consolidated had signed the indemnification agreement, which the court upheld as valid, Alterman was allowed to recover from Consolidated all sums paid to Allstate, plus the sums advanced in defending and settling the tort claim with Maguire, and the expenses incurred in prosecuting the federal suit for indemnification. The net effect of the district court's judgment was that Consolidated was liable, either directly or indirectly, for all sums expended by Allstate and Alterman in settling the tort claim at the state court level, plus the monies expended by Alterman in prosecuting the federal indemnity action.

On this appeal all three parties attack the district court's holding by raising various interdependent issues which we deal with in sequential order.

Validity of the Indemnification Agreement

[1] In the indemnification clause of the Consolidated-Alterman lease, Consolidated agreed to "be responsible for any loss, personal injury, death and/or damage that may be done to or suffered by drivers or other persons in connection with the operations to be carreid out pursuant to this agreement" and to "indemnify and save harmless [Alterman] against claim for any such loss". The lease further provided that Consolidated was to maintain and service the tractor-trailer unit and keep it in good repair during the hauling operation. Consolidated contends that the entire lease is invalid as against public policy because both of these clauses violate the Interstate Commerce Commission regulation which states that any contract for the use of leased trucking equipment "shall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto". Title 49, C.F.R., § 1057.4(a)(4).

As to the clause requiring Consolidated to maintain and service the tractor-trailer unit, Consolidated claims that the responsibility for vehicular maintenance was illegally shifted by Alterman to its lessor, contrary to the letter and spirit of the I.C.C. regulations. The purpose of the regulations, according to Consolidated, was to protect the public from unsafe vehicles by requiring each trucking company to be responsible for the mechanical condition of all the equipment it put on the highway. We need not decide the merits of this contemplation,[3]

[3] It would be hazardous to do so in any event since the Interstate Commerce Commission was not a party to this litigation and filed no briefs on the issue.

however, because the record in this case does not support Consolidated's initial assumption, i. e., that Alterman avoided responsibility for maintenance of the vehicle. Although not mentioned in either of the briefs, the lease specifically provided that "said vehicle shall be solely and exclusively under the direction and control of the lessee [Alterman] who *shall assume full common carrier responsibility . . . for the operation of such vehicle.*" (Emphasis supplied). Furthermore, prior to the Chicago-Miami trip, Alterman had the tractor-trailer unit inspected for mechanical defects. This fact is evidenced by an inspection sheet in the record listing some 19 different items which were inspected and found to be in good working order by a qualified mechanic.[4] The inspection sheet was signed by a responsible Alterman employee who certified that the person inspecting the vehicle was qualified to make an inspection and authorized to do so as a representative of Alterman. Thus, contrary to the assertion of Consolidated, Alterman was at all times *responsible* for the quality of the maintenance performed on the leased vehicle even though Alterman employees were not themselves bound to repair the vehicle. That responsibility was not evaded by requiring Consolidated to perform the actual mechanical work, any more than it would have been an evasion for Alterman to contract for vehicular maintenance with a private garageman, because Alterman continued to bear responsibility for the vehicle's mechanical condition.

[2] Turning to the indemnification clause itself we find nothing in the language of 49 C.F.R. § 1057(a) (4) which would prohibit two freely contracting parties from determining as between themselves, which party will ultimately bear the cost of damages done to a third person. The only conceivable argument against such an arrangement would be that the regulation seeks to prevent indemnification on the theory that a trucking company, knowing it does not have to pay damages, might

[4] We are not informed whether the mechanic was an employee of Alterman.

tend to be less careful in supervising and controlling the actions of its truck drivers. However, the same can be said of insurance coverage which the regulations obviously do not prohibit. We are of the opinion that had the I.C.C. intended to prevent indemnification between trucking companies it would have said so in precise terms.

Although Consolidated cites Carriers Insurance Exchange v. Truck Insurance Exchange, 4 Cir. 1962, 310 F.2d 653, and Alford v. Major (N.D.Ind., 1970) 314 F.Supp. 979, as authority for invalidating the indemnification agreement, we find those cases inapplicable to the facts here involved. In *Carriers* the indemnification clause was struck down because the two contracting trucking companies violated an I.C.C. safety regulation[5] and created a dangerous condition which resulted in injury to an innocent third party. In *Alford* there was a *prima facie* violation of 49 C.F.R. § 1057.4(a)(4) because the lessee allowed the lessor to retain full control over the truck and the driver during the term of the lease. As we have previously held in this opinion, Alterman's arrangement with Consolidated did not abrogate pertinent I.C.C. regulations. The absence of any regulatory violation on the part of Alterman removes this indemnification clause from the public policy considerations which were present in *Carriers* and *Alford*.

[3] Finally, we find no merit in Consolidated's contention that the plain language of the indemnification clause[6] excludes

[5] Title 49, C.F.R. § 1057.4(c).

[6] The entire clause reads as follows:

"[Lessor] Agrees to be responsible for any loss, personal injury, death and/or damage that may be done to or suffered by driver(s) or other persons in connection with the operations to be carried out pursuant to this agreement and shall indemnify and save harmless the Lessee against claim for any such loss, injury, death and/or damage and against any claim for compensation to any such person whatsoever. This shall apply to all cases of such loss, injury, death and/or damages, including cases of loss, injury, death and/or damages, for which either or both parties hereto may or shall be liable."

third-party injuries and applies only to injuries suffered by the truck driver or other individuals engaged in the leasing operation.

Actual Liability of Elmer Stewart

[4, 5] Although Consolidated signed an agreement allowing Allstate and Alterman to settle the Maguire lawsuit, the agreement specifically provided that any such settlement would not affect the rights of the parties in the federal suit for indemnity. Consolidated contends that it is not bound to indemnify Alterman because, assuming the validity of the indemnification agreement, no proof was ever offered that the driver of the truck, Elmer Stewart, was negligent and legally responsible for the collision which injured Maguire. However, in a finding of fact, which is not disputed on this appeal, the district court found that the tractor-trailer unit struck Maguire's automobile from the rear while both vehicles were traveling in the same direction. Under Florida law a rear-end collision raises a presumption of negligence on the part of the overtaking vehicle. Busbee v. Quarrier, Fla.App.1965, 172 So.2d 17. A review of the record reveals that Consolidated at no time requested the district court to take evidence on the question of the actual liability of Elmer Stewart, and Consolidated does not now argue before this court that it has affidavits, or any other possible source of evidence, which would tend to rebut this presumption of negligence which is raised by an undisputed fact. Thus, assuming without deciding, that proof of actual liability is required in this case, Consolidated has failed to create any issue of fact as to the negligence of the truck driver under Florida law.

Whether Allstate Provided Insurance Coverage for the Maguire Accident

[6] In holding that Allstate's insurance policy did not extend coverage to the damages suffered by Maguire, the district court

first concluded that, under the literal terms of the policy, Alterman was not afforded coverage for the Maguire accident. This conclusion is not contested by Alterman or Consolidated on appeal. Secondly, the court held that Alterman was the active tort-feasor and primarily liable for the injuries to Maguire due to the fact Alterman had possession of the tractor-trailer unit and control over the driver at the time the collision occurred. Alterman's argument on this point boils down to an assertion that the district court erred, as a matter of law, in holding that Alterman controlled and directed the truck driver during the term of the lease. It is readily apparent, however, that the district court's holding was based upon numerous undisputed facts which overwhelmingly support the conclusion under Florida law that the truck driver was under Alterman's control. See Martin v. Lloyd Motor Company, Fla.App.1960, 119 So.2d 413; Mercury Cab Owner's Association v. Jones, Fla.1955, 79 So.2d 782; Wilson v. Burke, Fla.1951, 53 So.2d 319. In its findings of fact the district court discussed in detail the relationship that existed between Elmer Stewart and Alterman and Consolidated:

> "Stewart at all times material to this action was not an employee of Consolidated. Stewart did not receive wages or a salary from Consolidated; he received as rent, a percentage of the net revenue generated by the leased equipment. Consolidated did not withhold money from Stewart's rental income for income tax or social security. Consolidated did not pay on behalf of Stewart, any monies to the Federal Government as employer's contributing share of an employee's social security payment. The President of Consolidated, John J. Jerue, testified that Stewart was not considered an employee. Consolidated considered Stewart to be self-employed or an independent contractor. . . . During the term of the single trip lease, the motor vehicle equipment was operated under Alterman's permit and authority, and over routes which Alterman was authorized

to serve. Alterman placards were installed on the exterior of the vehicle for the trip. Consolidated was not authorized by any public authority to transport non-exempt commodities in or into Florida. . . . Alterman had the right to accept or refuse Stewart as the driver of the leased equipment. Alterman accepted Stewart and provided him with detailed information and instructions as to Alterman's permits in the various states, telephone numbers of Alterman's terminals, names of Alterman people to be contacted at each terminal, and directions to check-call the Alterman terminal in Miami on a daily basis during the course of the transportation being performed under the trip-lease."

None of these findings is contested by Alterman. Moreover, all the facts which Alterman cites as contra to the court's conclusion concern various acts by Stewart which occurred before the lease came into existence and not at a time when Stewart was allegedly operating for Alterman.

The district court's holding that Allstate was not liable for Maguire's damages is without error.

Allstate's Right to Indemnification from Alterman

[7] There has been some question on this appeal as to the theory under which the district court allowed Allstate to recover from Alterman. Both Consolidated and Alterman contend that in order to recover Allstate must have a contractual relationship with the indemnitor, or alternatively, Allstate must subrogate its claim to Consolidated, in which case Allstate would be barred from recovery by the Consolidated-Alterman indemnity agreement. We reject this contention. Under Florida law Allstate is entitled to indemnification because it paid damages in good faith on account of the negligent and tortious act of another (Alterman) and a contractual relationship with Alterman is not required. See Mims Crane Service, Inc. v. Insley

Mfg. Corp., Fla.App.1969, 226 So.2d 836; Olin's Rent-A-Car Sys. v. Royal Continental Hotels, Fla.App.1966, 187 So.2d 349. The district court properly held that Alterman must indemnify Allstate for monies paid out in settlement of the tort claim.

The District Court's Holding That Consolidated Breached Its Subrogation Agreement With Allstate

We turn now to a point in the district court's opinion which has been the source of considerable confusion to the parties in this litigation. As its final conclusion of law, the district court held that:

"The indemnification agreement contained in the Consolidated-Alterman motor vehicle lease and agreement of February 6, 1964, effectively breached the subrogation clause of Allstate's policy[7] issued to Consolidated, resulting in a forfeiture of coverage for the Maguire accident and a liability for damages consequent upon the breach of Consolidated."

In its briefs Consolidated argues at length that the Consolidated-Allstate subrogation clause was not breached by the Consolidated-Alterman indemnity clause, and that the district court's holding on this issue is inconsistent with the court's prior holding that Allstate was entitled to indemnification from Alterman. On the other hand, Allstate argues in support of the district court's holding.

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[7] The subrogation clause stated as follows:

"Subrogation. In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights."

We are of the opinion, however, that it was unnecessary for the court to rule on whatever effect the indemnity agreement may or may not have had on Allstate's right of subrogation via Consolidated. Once the court held (1) that Alterman was primarily liable for the tort claim of Maguire and (2) that Allstate's insurance policy did not cover Alterman, there was no need to rule further in regard to Allstate. At that point Allstate was entitled to recover the sums it expended in settling the Maguire lawsuit from Alterman and the case was ended as far as Allstate was concerned.

The foregoing analysis is supported by the final judgment entered by the district court on September 30, 1970. Allstate was awarded judgment against Alterman, and in a separate part of the final judgment, Alterman was granted recovery against Consolidated. No mention is made of any recovery by Allstate against Consolidated, despite statements to the contrary in the court's opinion and initial judgment entered on September 3, 1970. We hold that the district court's final judgment correctly reflects the respective liabilities of the three parties and that Consolidated was not directly liable to Allstate.

Denial of Allstate's Recovery of Attorneys' Fees in the Federal Indemnity Suit

[8, 9] Although the district court allowed Allstate to recover from Alterman attorneys' fees expended in settling the Maguire lawsuit, the court denied Allstate recovery of its expenses incurred in prosecuting this action for indemnification. The general rule in Florida is that attorneys' fees are not recoverable in the absence of an express contract or a statutory provision, e. g., Ginsberg v. Ginsberg, Fla.App.1961, 128 So.2d 435. The cases[8] cited by Allstate are not authority for excepting this claim

[8] Morse Auto Rentals, Inc. v. Dunes Enterprises, Inc., Fla.App. 1967, 198 So.2d 652; Thomas Awning and Tent Co. v. Toby's Twelfth Cafeteria, Fla.App.1967, 204 So.2d 756; Fincher Motor Sales, Inc. v. Lakin, Fla.App.1963, 156 So.2d 672; Fontainebleau Hotel Corporation v. Postol, Fla.App.1962, 142 So.2d 299; Hertz Corporation v. Ralph M. Parsons Company (M.D.Fla.1968), 292 F.Supp. 108.

for attorneys' fees from the general rule in Florida. Allstate's contention that the district court erred in denying the attorneys' fees is without merit.

To summarize the effect of our disposition of the several issues on this appeal, we note that Alterman, as the active tortfeasor, was primarily responsible for payment of the Maguire tort claim. Were it not for the Consolidated-Alterman indemnity contract, Alterman would bear the entire cost of the Maguire settlement and Consolidated would pay nothing. However, because of the valid indemnity contract, Consolidated must reimburse Alterman for all Alterman's losses.

The final judgment of the district court is hereby affirmed.

APPENDIX D

Carolina Freight Carriers Corporation for the Use and Benefit of Liberty Mutual Insurance Company, Appellant,

v.

Pitt County Transportation Company and Old Republic Insurance Company, Appellees.

No. 73-1812.

United States Court of Appeals, Fourth Circuit.

Argued Nov. 8, 1973.

Decided Feb. 21, 1974.

492 F.2d 243 (1974)

Before Winter, Butzner and Field, Circuit Judges.

Field, Circuit Judge:

Finding an indemnification provision in a lease of motor carrier equipment to be violative of a pertinent regulation of the Interstate Commerce Commission, the district court granted defendant's motion for judgment on the pleadings and the plaintiff has appealed.

The facts are not in dispute. Carolina Freight Carriers Corporation [Carolina] leased a tractor-trailer truck accompanied by its driver from Pitt County Transportation Company [Pitt]. During the rental period the driver allegedly parked improperly on a highway wayside and the truck moved backwards striking one Robert Powers and his infant daughter. The infant was

killed and Powers was seriously injured. Thereafter, Carolina's insurer compromised the claims by payment of $50,000, and Carolina now seeks indemnity on behalf of its insurer from Pitt, the lessor.[1]

The issue presented to the court below was whether Pitt owed a duty to indemnify Carolina under the provisions of the lease, a copy of which was incorporated in the complaint as an exhibit thereto and which reads in pertinent part as follows:

> Carolina Freight Carriers Corporation, Lessee, hereby acknowledges receipt of and leases from Pitt County Trucking Co., Lessor, of Farmville, North Carolina * * * for its exclusive possession, control and use, and assumes complete responsibility in respect thereto for the duration of this Motor Vehicle Trip Agreement, the following vehicular equipment to be used by said lessee beginning at 1 PM o'clock on 6/19/69 in its interstate service to transport merchandise.
>
> * * * * * * * *
>
> 2. Lessee will assume and pay all costs of public liability and property damage insurance on the vehicle while operating at the direction of the Lessee and provide insurance covering cargo being transported at the direction of the Lessee. *However, in the event any loss or damage to cargo or property damage or personal injury to any third person takes place by reason of negligence or dishonesty of the owner, its Agents, servants, or employees, then the owner does hereby agree to assume and be fully responsible for any such damage and, in the event payment shall be made by the Lessee herein, Lessor does hereby agree to indemnify the Lessee and hold the Lessee harmless for any and all claims.*

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[1] For the purpose of clarity, this opinion will refer to the parties as "Carolina" and "Pitt."

In the event that Lessee's insurance company is required to make payment therefor, then, and in that event, the insurance company shall be subrogated to the rights of the Lessee against the Lessor herein.

* * * * * * *

5. Lessor agrees that during the term of this lease *the motor vehicle equipment described above shall be under such control of the Lessee as required by the rules and regulations of the Interstate Commerce Commission* and for the limited purpose of safety to the public and safe delivery of shipment.

* * * * * * *

7. Lessor agrees to be fully responsible for the above described equipment maintaining said equipment in accordance with the "safety" regulations and specifications set forth by the Interstate Commerce Commission to keep said equipment in good operating condition and appearance; to maintain such records as shall be required by the Interstate Commerce Commission, Government, State, or any other regulatory authority. Lessor agrees to provide at his sole and own expense all necessary oil, gasoline, fuel, tires, repairs, accessories, and/or other items required for the operation and maintenance of said vehicle during the term of this lease. Lessee may require Lessor to store his equipment when not in use on the Lessee's premises.

* * * * * * *

9. Lessor agrees that during the term of this lease:

(a) He will be solely responsible for the payment of his own Social Security Taxes, Old Age Benefits, Unemployment Compensation, Taxes, Workmen's Compensation Insurance, Federal Income Taxes, license fees, and payment of all payroll deductions and taxes for employees furnished by the Lessor.

(b) To pay fines, costs and expenses incurred in the operation of the equipment leased herein in the performance of this lease are to be borne by and be the sole responsibility of the Lessor.

(c) *To indemnify Lessee against loss or liability, if any resulting from the injury or death of the driver or drivers of the vehicle above described or any helpers employed by such drivers in connection with the loading or unloading of said vehicles.*

(d) *To indemnify Lessee against any loss or damage resulting from the negligence, incompetence or dishonesty of said drivers or helpers.*

(e) To indemnify Lessee against any loss or damage to or destruction of the trailer or other such equipment of the Lessee, towed by the Lessor or his employees.

(f) To indemnify the Lessee against any loss resulting from claims brought against the Lessee for any property damage and bodily injury sustained by the public while the tractor is detached from a trailer.

* * * * * * * *

11. The Lessor shall perform this contract in a safe, competent and workmanlike manner and shall be responsible to the Lessee for complying and together with his employees, agents and servants shall comply with all applicable requirements of federal, state and local government including but not limited to the rules and regulations of the Interstate Commerce Commission.

12. The Lessor shall at its expense employ all necessary drivers, driver's helpers, and laborers who shall be ex-

perienced, competent, and qualified to carry out work to be performed by the Lessor under this contract. Such employees shall also be qualified under and meet all the requirements of applicable federal and state laws and municipal ordinances and the rules and regulations of the Interstate Commerce Commission and other regulatory authorities.

* * * * * * *

18. This is the entire agreement of the parties. No alteration, amendment or future understanding shall be binding unless in writing and signed by both parties. *This agreement shall be governed by the laws of the State of North Carolina.* This Motor Vehicle Equipment Lease supercedes and cancels all prior agreements and leases entered into by the parties. (Emphasis supplied.)

In its answer to the complaint Pitt did not dispute the execution or terms of the lease agreement, but alleged that the provisions with respect to indemnification and the responsibility of Pitt are unenforceable since they are contrary to the regulations of the Interstate Commerce Commission. The relevant regulatory section, 49 C.F.R. 1057.4, reads:

"(a) *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:

* * * * * * *

(4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, * * *."

Although acknowledging that North Carolina law, designated as controlling in the agreement, recognizes the validity of such

an indemnification provision,[2] the district judge concluded that the effect of the provision was to relieve the lessee from responsibility for damages to third parties and, accordingly, it was "violative of the spirit and letter" of the federal regulation and therefore unenforceable.

In all deference, we think the district court misread the lease agreement for there is nothing in it which purports to relieve Carolina from any responsibility to third parties for damages resulting from the operation of the leased equipment. On the contrary, the agreement specifically provides that Carolina was taking exclusive possession and control of the equipment and assuming "complete responsibility in respect thereto." Recognizing the regulatory obligations, the instrument states that the equipment should be under "the control of the LESSEE as required by the rules and regulations of the Interstate Commerce Commission" for the purpose of safety to the public.

Nor do we find the indemnification provision violative of either the spirit or letter of the I.C.C. regulation. "The use of non-owned equipment by authorized carriers is not illegal, either under the Act or the rules under consideration," American Trucking Assns. v. United States, 344 U.S. 298, 303, 73 S.Ct. 307, 311, 97 L.Ed. 337 (1953), and the right of a carrier to augment its equipment by a lease arrangement such as we have before us is specifically authorized by statute, 49 U.S.C. § 304 (e), and the regulations, 49 C.F.R. 1057.1-1057.6.[3] While such lease arrangements must, of course, be in bona fide compliance with the regulations, which were promulgated primarily

---

[2] S & N Freight Line, Inc. v. Bundy Truck Lines, Inc., 3 N.C. App. 1, 164 S.E.2d 89 (1968); Newsome v. Surratt, 237 N.C. 297, 74 S.E.2d 732 (1953).

[3] The operation of equipment incident to such a lease by a person other than a regular employee of the lessee is recognized and countenanced by 49 C.F.R. 1057.4(e).

for the protection of the public, we agree with the Fifth Circuit there is nothing in the language of the regulations "which would prohibit two freely contracting parties from determining, as between themselves, which party will ultimately bear the costs of damages done to a third person." Allstate Insurance Co. v. Alterman Transport Lines, Inc., 465 F.2d 710, 713 (5 Cir. 1972).

In granting defendant's motion, the court below placed primary reliance on the case of Alford v. Major, 470 F.2d 132 (7 Cir. 1972). We, however, do not find *Major* persuasive for the reason, among others, that the lessee in that case conceded a prima facie violation of the regulation in that the lessor had, in fact, retained full custody and control over the truck and driver during the term of the lease. Nor is the conclusion we reach discordant with our decision in Carriers Insurance Exchange v. Truck Insurance Exchange, 310 F.2d 653 (4 Cir. 1962), where at trial there was abundant evidence that the parties "used the written lease to give the appearance of compliance with the law while actually ignoring it, * * *." The basis of that decision was succinctly stated:

> "In short, the parties deliberately entered into a transaction in violation of the law and of the regulations which had been promulgated to insure the safe transportation of a dangerous substance for the protection of the general public." P. 657.

Since there is nothing in the indemnification provision facially violative of the Commission's regulations, it was error to grant defendant's motion for judgment on the pleadings. The judgment of the district court is reversed and the case remanded for further proceedings consistent herewith.

Reversed and remanded.

Supreme Court, U. S.
FILED
MAY 1 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

Number 74-54

TRANSAMERICAN FREIGHT LINES, INC.,
Petitioner,

vs.

BRADA MILLER FREIGHT SYSTEM, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 2, 1974
CERTIORARI GRANTED MARCH 17, 1975

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DOCKET ENTRIES

United States District Court for the
Southern District of Illinois
Southern Division

No. 4519

Sandra Wear,

Plaintiff,

vs.

Brada Miller Freight System, Inc., and Transamerican Freight Lines, Inc.

Transamerican Freight Lines, Inc.,

Cross-Plaintiff,

vs.

Brada Miller Freight System, Inc.,

Cross-Defendant.

Brada Miller Freight System, Inc.,

Cross-Plaintiff,

vs.

Transamerican Freight Lines, Inc.,

Cross-Defendant.

Date	Proceedings
1971	
Sept. 23	Amended Cross-Claim of Deft. Transamerican Freight Lines, Inc., Against Defendant Brada Miller Freight System, Inc., filed.

Dec. 1 Answer of Deft. Brada Miller Freight System to Amended Crossclaim of Deft. Transamerican Freight Lines, filed.

1973

Feb. 23 Motion of Defendant Brada Miller Freight System, Inc., for Summary Judgment against Transamerican Freight Lines, Inc., filed.

Feb. 23 Memorandum of Law in support of Motion of Brada Miller Freight System Inc., for Summary Judgment, filed.

Apr. 4 Parties present in court with their respective counsel, Motion of Brada Miller Freight System, Inc., for Summary Judgment heard. Taken under advisement. (Poos, Judge)

Apr. 25 Opinion of Court filed—Ordered that Motion of Brada Miller for Summary Judgment against Defendant Transamerican Freight Lines, Inc., is granted. See Order.

May 23 Notice of Appeal of Cross-Claimant Transamerican Freight Lines, Inc., filed.

United States Court of Appeals
For the Seventh Circuit

No. 73-1773

Sandra Wear,

Plaintiff,

vs.

Brada Miller Freight System, Inc., and Transamerican Freight Lines, Inc.,

Defendants.

Transamerican Freight Lines, Inc.,

Cross-Claimant-Appellant,

vs.

Brada Miller Freight System, Inc.,

Cross-Defendant-Appellee.

1973

Aug. 24 Filed original record on appeal.

1974

Apr. 25 Heard and taken under advisement—morning session.

May 6 Entered final order Affirming.

In the United States District Court
Southern District of Illinois
Southern Division

Sandra Wear,
Plaintiff,
vs.
Brada Miller Freight System, Inc., and Transamerican Freight Lines, Inc.,
Defendants.
No. 68C271(1)

AMENDED CROSSCLAIM
Of Defendant Transamerican Freight Lines, Inc., Against Defendant Brada Miller Freight System, Inc.

(Filed September 23, 1971)

Comes now defendant, Transamerican Freight Lines, Inc., and for its crossclaim against defendant, Brada Miller Freight System, Inc., states and alleges as follows:

1. That on January 19, 1968, defendant, Brada Miller Freight System, Inc. either owned, or held under a lease for more than thirty (30) days, certain motor vehicle equipment, including a 1963 International Tractor bearing Michigan License Plate No. 9929CC, and a 1965 Brown Trailer, bearing Michigan License No. 500-214.

2. That on January 19, 1968, defendant, Brada Miller Freight System, Inc. entered into a Lease Agreement, in Detroit, Michigan, whereby said defendant leased the tractor and trailer mentioned in paragraph 1 hereof to defendant, Transamerican Freight Lines, Inc., for a single trip from Detroit, Michigan to Kansas City, Missouri.

3. That such Lease Agreement, as a part thereof states:

"It is mutually understood and agreed by and between the parties hereto that First Party (Transamerican Freight Lines, Inc.) shall not be responsible to Second Party (Brada Miller Freight System, Inc.) its agents, servants and employees, for any negligence of the Second Party, its agents, servants or employees, or for any loss, damage, injury or expense arising out of the failure of Second Party to carry out the terms of this agreement. Second Party hereby agrees to indemnify and save harmless First Party from any and all claims, suits, losses, fines, or other expenses arising out of, based upon, or incurred because of injury to any person or persons, or damage to property sustained or which may be alleged to have been sustained by reason of any negligence or alleged negligence on the part of Second Party, its agents, servants, or employees, and for any loss or damage to cargo resulting from any negligence or unlawful act of Second Party, his agents, servants and employees. It is mutually understood and agreed that Second Party will defend at his own expense and cost, any and all suits that may be brought against First Party for injuries sustained, including death resulting therefrom, or damage to property caused or alleged to have been caused by the negligence of any person employed by Second Party, while engaged in the performance of any of the work required by the terms and conditions of this agreement, and for any cargo loss sustained resulting from any negligence or unlawful act on the part of Second Party, his agents, servants and employees."

4. That plaintiff in the within lawsuit claims damages from defendants and alleges that on or about the 22nd of January, 1968, U. S. Highway 40, one mile east of Smithboro, Illinois, is an open and public street and highway located in the County of Bond, State of Illinois, plaintiff was operating a motor vehicle

west on Highway 40 and that at said time and place defendant, acting by and through their agent, servant, chauffeur and employee, operated a motor vehicle west on Highway 40 and as a direct result of the joint and concurrent negligence of the defendants, acting by and through its agents, servants, chauffeur and employee, in striking and colliding with the motor vehicle being operated by plaintiff, plaintiff was caused to sustain serious and permanent injuries."

5. That the motor vehicle referred to in plaintiff's petition was the tractor and trailer which was referred to in paragraph 1 hereof, and that at the time and place alleged in plaintiff's petition, the said tractor and trailer truck was proceeding under and subject to the terms of the Lease Agreement referred to in paragraph 2 hereof, and was being driven and operated by an agent, servant and employee of defendant, Brada Miller Freight System, Inc.

6. That pursuant to the provisions of the said Lease Agreement, defendant, Transamerican Freight Lines, Inc., has made demand on defendant, Brada Miller Freight System, Inc., to take over and assume the defense of plaintiff's claim against defendant, Transamerican Freight Lines, Inc., and to hold defendant, Transamerican harmless from any judgment against it by plaintiff, and from any expenses of defending plaintiff's within action against defendant, Transamerican, all of which defendant, Brada Miller, has refused to do and still so refuses.

7. That pursuant to agreement of parties, plaintiff's cause of action against defendant, Transamerican Freight Lines, Inc., was separated from the other issues of this case for trial and as so separated proceeded to trial October 5, 1970 with the remaining separated issues of the case, including the crossclaim of Transamerican Freight Lines, Inc. against defendant, Brada Miller Freight System, Inc., passed until further order of court.

8. That during the course of the trial of plaintiff's cause of

action against defendant, Transamerican Freight Lines, Inc., negotiations for settlement of plaintiff's case advanced to a point where it was deemed prudent to reach a settlement with plaintiff in the amount of $80,000.00. At such time defendant, Transamerican Freight Lines, Inc., renewed its tender of defense to defendant, Brada Miller Freight System, Inc., and fully advised defendant, Brada Miller, whose attorney had been present in court throughout the trial, of the terms of the proposed settlement and advised defendant, Brada Miller, that if they had any objection to the proposed settlement they were again invited to take over the defense from that point, but defendant, Brada Miller, refused so to do and refused to state that they had any position or feeling that the settlement was unreasonable for any reason. Whereupon, defendant, Transamerican Freight Lines, Inc., entered into an agreement with plaintiff to settle plaintiff's case against defendant, Transamerican Freight Lines, Inc., for the sum of $80,000.00 with Transamerican Freight Lines, Inc. reserving all of its rights against defendant, Brada Miller Freight System, Inc.

9. That thereafter a dispute between plaintiff and defendant, Transamerican Freight Lines, Inc., as to certain terms of the settlement agreement delayed the completion of the settlement, but that on March 6, 1971, Transamerican Freight Lines, Inc. paid to plaintiff the sum of $80,000.00 and obtained releases and a stipulation for dismissal which has been entered by the court dismissing plaintiff's cause of action against defendant, Transamerican Freight Lines, Inc., with prejudice but again reserving all of defendant's, Transamerican Freight Lines, Inc., rights in its crossclaim against defendant, Brada Miller Freight Systems, Inc.

10. That defendant, Transamerican Freight Lines, Inc. has been damaged in the sum of $80,000.00 paid to plaintiff in settlement and in the further amount of $15,500.00 for expenses incurred in the defense of the action against it by Sandra Wear.

For all of which sums defendant, Brada Miller Freight System, Inc., is indebted to Transamerican Freight Lines, Inc. pursuant to the terms of the Lease Agreement between such defendants referred to herein.

Wherefore, cross-claimant, Transamerican Freight Lines, Inc., prays judgment against defendant, Brada Miller Freight System, Inc., for the sum of $95,500.00 with interest thereon in the amount of 6% per annum from and after March 6, 1971 and its costs herein expended.

(Certificate of Service Omitted in Printing)

In the United States District Court
Southern District of Illinois
Southern Division

(Title Omitted in Priting)

ANSWER OF DEFENDANT BRADA MILLER FREIGHT SYSTEM TO AMENDED CROSS-CLAIM OF DEFENDANT TRANSAMERICAN FREIGHT LINES

(Filed December 1, 1971)

Comes now Brada Miller Freight System, Inc. (Brada Miller) and files its answer to the amended cross-claim of defendant Transamerican Freight Lines and for said answer states:

1. For answer to Paragraph 1, defendant Brada Miller states that it held the motor vehicle equipment under Equipment Lease Agreement dated November 1, 1967.

2. Defendant Brada Miller denies the allegations of Paragraph 2.

3. Defendant Brada Miller denies that it entered into any Lease Agreement with defendant Transamerican Freight Lines and, therefore, denies the allegations of Paragraph 3.

4. For answer to Paragraph 4, defendant Brada Miller refers to the allegations of plaintiff's first amended complaint.

5. Defendant Brada Miller denies the allegations of Paragraphs 5 and 6.

6. Defendant Brada Miller admits the allegations of Paragraph 7.

7. For answer to Paragraph 8, defendant Brada Miller admits that at no time did it agree that any settlement between plaintiff and defendant Transamerica was reasonable; defendant Brada Miller denies the other allegations of Paragraph 8.

8. Defendant Brada Miller is without knowledge regarding the allegations of Paragraph 9 and, therefore, denies same.

9. Defendant Brada Miller denies the allegations of Paragraph 10.

10. Defendant Brada Miller denies each and every other allegation in defendant Transamerica's Amended Cross-claim not specifically admitted herein.

11. For further answer, defendant Brada Miller states that defendant Transamerica's Amended Cross-claim does not allege facts which constitute a cause of action against defendant Brada Miller upon which relief may be granted.

12. For further answer, defendant Brada Miller states that defendant Transamerica's Amended Cross-Claim fails to allege that any settlement it may have made with plaintiff was fair and reasonable.

13. For further answer, defendant Brada Miller states that in making any settlement with plaintiff, defendant Transamerican acted as a volunteer.

14. For further answer, defendant Brada Miller states that the purported Lease Agreement was not authorized by defendant Brada Miller; that no person had any authority, express or implied, to enter into any such agreement on behalf of Brada Miller; that at the time of the accident referred to in plaintiff's First Amended Petition, the vehicle was being operated solely on behalf of defendant Transamerican.

15. For further answer, defendant Brada Miller states that at the time of the accident referred to in plaintiff's First Amended Petition, the vehicle was reported to Brada Miller to have been "out of service"; that the owner of said vehicle illegally and fraudulently and without the knowledge and consent of Brada Miller, allowed said vehicle to be used by and on behalf of and for the purposes of defendant Transamerican.

16. That defendant Brada Miller has tendered to the Court the sum of $225.00, being the amount of purported payment

made by check from defendant Transamerican to defendant Brada Miller which check was mistakenly, accidentally, routinely and through mistake of fact negotiated by defendant Brada Miller.

17. That defendant Transamerican used and operated the vehicle in violation of the Interstate Commerce Commission's Lease and Interchange Regulations, 49 CFR 1057 et seq.

Wherefore, having fully answered, defendant Brada Miller prays to be dismissed and for costs.

(Signature omitted in printing.)

In the United States District Court
Southern District of Illinois
Southern Division

AFFIDAVIT

(Dated November 22, 1968)

State of Indiana
County of Howard } ss.

Donavon F. Rayl, being duly sworn upon his oath, deposes and states:

1. My residence address is 128 East Boulevard, Kokomo, Indiana; I am Vice President of Brada Miller Freight System, Inc., whose address is 1210 South Union Street, Kokomo, Indiana; and I am authorized to make this affidavit on behalf of Brada Miller Freight System, Inc.

2. On November 1, 1967, Brada Miller Freight System, Inc. executed an Equipment Lease Agreement with May Mawby for a vehicle described as follows: Unit No. 7290, Trac. Type 3 axle Conv., Make International, Year 1963, Serial No. FD21837G, Lic. No. & State 9929CG; and on November 16, 1967 Brada Miller Freight System, Inc. executed an Equipment Lease Agreement with May Mawby for a tractor described as follows: Unit No. 7290 ZW, S.Trlr. Type Flat, Make Brown, Year 1965, Serial No. TCD464, Lic. No. & State Mich. 502493. A copy of the said Equipment Lease Agreements are attached hereto as Exhibits 1-A and 1-B.

3. On or about January 19, 1968, Howard L. Hardrick, the driver of the said equipment, reported to the office of Brada

Miller Freight System, Inc. at Detroit, Michigan that the equipment required repairs and would be "out of service" in a repair shop for several days, and pursuant to the said report, the said Howard L. Hardrick completed a driver's daily log for the dates of January 19, 20 and 21 of 1968. A copy of the said driver's daily logs are attached hereto as Exhibits 2-A, 2-B and 2-C.

4. On January 19, 1968 the said Howard L. Hardrick, without either the knowledge or authority of Brada Miller Freight System, Inc., executed a "Lease Agreement" with Transamerican Freight Lines, Inc., a copy of which "Lease Agreement" is attached hereto as Exhibit 3.

5. Howard L. Hardrick, the driver of the tractor herein identified at paragraph 2, was not authorized to act for Brada Miller Freight System, Inc. in the execution of the said "Lease Agreement" with Transamerican Freight Lines, Inc.

6. The said "Lease Agreement", herein attached as Exhibit 3, was in violation of the provisions of Title 49, Code of Federal Regulations, Section 1057, in that the said regulation, at Section 1057.4(a)(4) and at Section 1057.4(a)(4)(i) states in part as follows:

> 1057.4 Augmenting Equipment. Other than equipment exchanged between motor common carriers in interchange service as defined in Sec. 1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:
>
> (a) Contract Requirements. The contract, lease, or other arrangement for the use of such equipment:
>
> (1) Parties. Shall be made between the authorized carrier and the owner of the equipment.

(2) Written Contract Required. Shall be in writing and signed by the parties thereto or their regular employees or agents duly authorized to act for them in the execution of contracts, leases, or other arrangements. * * *

(4) Exclusive Possession and Responsibilities. Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except:

(i) Lessee May Be Considered as Owner. Provision may be made therein for consideration of the owner for the purpose of subleasing under these rules to other authorized carriers during such duration. * * *

7. During the period of time that the said Howard L. Hardrick reported to Brada Miller Freight System, Inc. that the said equipment was "out of service" the said Hardwick arranged with a person known as Wesley Mawby, the husband of May Mawby, to place the said equipment under the control of Transamerican Freight Lines, Inc., and thereafter, the said Transamerican Freight Lines, Inc. made arrangements for the use of the said vehicle by directing the said vehicle to pick up a load of sheet steel to haul from Ecrose, Michigan to 7500 East Twelfth Street, Kansas City, Missouri.

8. The said equipment, while it was being operated for the purposes and benefits of Transamerican Freight Lines, Inc., by the said Howard L. Hardrick, was involved in an accident on January 22, 1968 at or about 7:30 a.m. on route 40, east of Smithboro in the State of Illinois, with an automobile driven by Sandra K. Wear.

9. The said Howard L. Hardrick, the driver of the equipment at the time of the accident on January 22, 1968, reported the accident to Roy H. Christiansen, an attorney for Transamerican

Freight Lines, Inc., but did not report the accident to Brada Miller Freight System, Inc.

10. The first knowledge that Brada Miller Freight System, Inc. had of this accident was about May 6, 1968.

Further affiant sayeth not.

/s/ DONAVON F. RAYL

(Jurat omitted in printing.)

after called LESSEE, and MAY DAIRY of 17620 COLGATE
DETROIT (City) MICHIGAN (State) (Name) (Address) hereinafter called LESSOR,

WITNESSETH THAT:

WHEREAS, Lessee is engaged in the business of interstate transportation of property by motor vehicle, and Lessor is the owner of the following described vehicle or vehicles:

	Trac. Type	Make	Year	Serial No.	Lic. No. & State	PSC No.
Unit No. 7290	3 axle Conv.	International	1963	FD218370	992903	
Unit No.	S. Trlr. Type	Make	Year	Serial No.	Lic. No. & State	

NOW THEREFORE, in consideration of this lease and the agreement hereafter expressed, it is hereby agreed as follows:

1. Lessor does hereby lease to Lessee the above described equipment for use only in transporting such property as Lessee may require for a series of trips between various points and places, for the period of one year from the date hereof, which period shall continue in effect thereafter unless terminated by either party upon ten days notice in writing; provided further, that after thirty days from the date of this instrument either party may terminate this lease at any time by giving a written notice to the other party of its intention so to do at least ten days prior to the proposed date of termination.

2. Lessor warrants that said motor vehicles are in good operating condition and in all respects in compliance with the motor carrier safety regulations of the Interstate Commerce Commission, and that he will maintain the same in such condition during the entire term of this lease. In the event of the failure of Lessor to pay said operation costs or maintain or keep said vehicles and equipment in first-class operating condition, Lessee may pay the necessary operating costs and necessary costs of keeping said vehicles in first-class condition, deducting same from rentals due under this lease. Lessor shall furnish all fuels, gas, oils, lubricants, tires, parts, repairs, licenses and permits in the State of domicile, and all other materials and services, and will pay all other expenses incidental to operating the above described equipment in a safe and dependable manner. Lessor shall obtain duplicate fuel tickets in the State of Kentucky, and will provide Lessee with one copy of all such fuel tickets evidencing purchases in this State. Lessor shall in no instance incur indebtedness in the name of the Lessee without express permission in each separate instance. Lessor shall carry his own insurance for collision, upset or other damage to the equipment, and for fire, theft, etc., and will hold Lessee harmless from all liability in connection with damage to said equipment. The Lessee shall not be liable for any damage to vehicles resulting from collision that may occur between leased equipment employed by the Lessee when the insurance coverage is carried under the same policy.

3. Payment by the Lessee for the use of the Lessor's equipment shall be (33 %) of the gross revenue assigned to Brada Miller Freight System Inc., and received for the transportation of properties transported by the Lessor's equipment. The division of revenue for the transportation of said properties shall be, 33 % tractor and _____ % trailer. Lessor further agrees that all other proper charges as hereinafter set forth shall be deducted from the (33 %) gross equipment revenue and the difference paid to the Lessor as net lease equipment rental (net lease equipment rental shall be interpreted to mean the net proceeds after all proper deductions). Lessor agrees to submit all questions, with regard to the periodic settlement statements for equipment rental compensation and/or driver's wages, in writing. After thirty (30) days have elapsed without a written inquiry having been submitted by the Lessor to the Lessee, any settlement statement for equipment rental and/or driver's wages, shall be considered correct and final.

4. Before settlement for the equipment rental, all known expenses of operation, including but not limited to rate errors necessitating charge backs, cost of labor connected with the loading or unloading of the vehicle, and all expenses of a like or similar character growing out of the operation of the equipment, shall be deducted from the equipment earnings, and if any such charges are later discovered, particularly charge backs for rate errors, the same shall be deducted from subsequent settlements for equipment earnings. And to secure the payment of any such charges or amounts due the Lessee, a cash bond or reserve in the sum of ($300.00) shall be required from the Lessor which bond shall be paid by deducting from the equipment earnings the sum of $20.00 each pay period from the beginning of the lease until the amount of the bond has been deposited. This bond shall also be used to pay for any and all damages to the property of the Lessee, either owned or leased by the Lessee, other than the equipment listed in this equipment lease agreement, these damages resulting from negligence of the driver and/or owner of the equipment listed in this equipment lease agreement. This bond shall be held by the company for a minimum period of ninety (90) days after the cancellation or expiration of the lease. However, the release of the bond as herein provided shall in no way relieve the Lessor of his liability to the Lessee for any amounts which may thereafter be determined to be due to the Lessee as a result of such charge backs or other expenses.

5. The Lessor shall be held responsible for all loss, shortage or damage of cargo which is the result of the operation of the Lessor's equipment while it is in a faulty or improper condition, also any loss, shortage or damage of cargo which is the result of the driver's carelessness or negligence.

6. For the duration of this lease the equipment shall be driven by a duly and properly qualified driver. Provided further, that only a driver first approved and found duly qualified by the Lessee shall be permitted to drive the equipment at any time, and no change in drivers shall be made until approved by the Lessee.

7. Said equipment shall be and remain under the complete control of the Lessee for the duration of this lease and the driver of said equipment shall be considered the employee of the Lessee. However, the Lessor shall be solely liable and responsible for any and all judgments, fines, costs and expenses, including bail bond costs and attorneys fees, levied against either the Lessor or Lessee as a result of the violation of any criminal, traffic or weight law of any state or municipality committed by the Lessor or his drivers, and the Lessor agrees to indemnify and save the Lessee harmless against any and all such costs and expenses.

8. Lessee shall maintain Public Liability and Property Damage insurance as well as Workmen's Compensation insurance and agrees to hold Lessor harmless from any such claim while said equipment is in the actual service of the Lessee; however, Lessor shall maintain at his own expense Public Liability and Property Damage insurance and present proof of such coverage from his Insurance Carrier which shall be effective while the equipment is parked, deadheading, bobtailing or otherwise being operated in any manner other than under or pursuant to specific dispatch instructions from the Lessee; and the Lessor will save Lessee harmless from any loss, claim or liability while the equipment, or either unit thereof is so used or employed. This shall be construed to mean that the Lessee will not be responsible for Public Liability, Property Damage, Workmen's Compensation or Cargo insurance when the equipment is being used other than in connection with the transportation of freight under the authority and with the authorization of the Lessee, or when the same is being used in any manner except under and pursuant to dispatch instructions of the Lessee.

9. All Equipment Lease Agreements executed in the State of Indiana shall be conclusively presumed to be Indiana contracts, and all accidents resulting in injuries to a Lessor or his driver shall be compensable, if at all, insofar as Lessee is concerned, only under and pursuant to the terms and provisions of the Indiana Workmen's Compensation Law, irrespective of the residency or citizenship of the Lessor or driver or the place of the accident out of which the injury arises.

10. Painting and lettering of Lessor's equipment in the current design will be effected immediately after the signing of the Equipment Lease Agreement, without reservation, Lessor's expense.

11. Termination of the Lease Agreement at any time and for whatever cause will be immediately followed by the removal within twenty-four hours of the name "Brada Miller Freight System, Inc.," all permit numbers, and other signs concerning or pertaining to operations for Brada Miller Freight System, Inc., from the Unit(s) leased.

Dated at Detroit Michigan this 1st day of November, 1967

BRADA MILLER FREIGHT SYSTEM, INC.

By _____ (Lessee)

_____ (Lessor)

By _____ (Agent)

FORM 1025 REV. 7-63 SHEARER PRINTING SER.

EXHIBIT 1-A

THIS AGREEMENT made the day and year hereinafter written, between BRADA MILLER FREIGHT SYSTEM, INC., KOKOMO, IND., hereinafter called LESSEE, and MAY DAIRY of 17620 Colgate
Detroit (City) Michigan (State) (Name) (Address) hereinafter called LESSOR,

WITNESSETH THAT:

WHEREAS, Lessee is engaged in the business of interstate transportation of property by motor vehicle, and Lessor is the owner of the following described vehicle or vehicles:

	Trac. Type	Make	Year	Serial No.	Lic. No. & State	PSC No.
Unit No. 7290 Z1	Flat	Brown	1965	TCD464	Mich. 502493	
Unit No.	S. Trlr. Type	Make	Year	Serial No.	Lic. No. & State	

NOW THEREFORE, in consideration of this lease and the agreement hereafter expressed, it is hereby agreed as follows:

1. Lessor does hereby lease to Lessee the above described equipment for use only in transporting such property as Lessee may require for a series of trips between various points and places, for the period of one year from the date hereof, which period shall continue in effect thereafter unless terminated by either party upon ten days notice in writing; provided further, that after thirty days from the date of this instrument either party may terminate this lease at any time by giving a written notice to the other party of its intention so to do at least ten days prior to the proposed date of termination.

2. Lessor warrants that said motor vehicles are in good operating condition and in all respects in compliance with the motor carrier safety regulations of the Interstate Commerce Commission, and that he will maintain the same in such condition during the entire term of this lease. In the event of the failure of Lessor to pay said operation costs or maintain or keep said vehicles and equipment in first-class operating condition, Lessee may pay the necessary operating costs and necessary costs of keeping said vehicles in first-class condition, deducting same from rentals due under this lease. Lessor shall furnish all fuels, gas, oils, lubricants, tires, parts, repairs, licenses and permits in the State of domicile, and all other materials and services, and will pay all other expenses incidental to operating the above described equipment in a safe and dependable manner. Lessor shall obtain duplicate fuel tickets in the State of Kentucky, and will provide Lessee with one copy of all such fuel tickets evidencing purchases in this State. Lessor shall in no instance incur indebtedness in the name of the Lessee without express permission in each separate instance. Lessor shall carry his own insurance for collision, upset or other damage to the equipment, and for fire, theft, etc., and will hold Lessee harmless from all liability in connection with damage to said equipment. The Lessee shall not be liable for any damage to vehicles resulting from collision that may occur between leased equipment employed by the Lessee when the insurance coverage is carried under the same policy.

3. Payment by the Lessee for the use of the Lessor's equipment shall be (13 %) of the gross revenue assigned to Brada Miller Freight System Inc., and received for the transportation of properties transported by the Lessor's equipment. The division of revenue for the transportation of said properties shall be, _____ % tractor and 13 % trailer. Lessor further agrees that all other proper charges as hereinafter set forth shall be deducted from the (13 %) gross equipment revenue and the difference paid to the Lessor as net lease equipment rental (net lease equipment rental shall be interpreted to mean the net proceeds after all proper deductions). Lessor agrees to submit all questions, with regard to the periodic settlement statements for equipment rental compensation and/or driver's wages, in writing. After thirty (30) days have elapsed without a written inquiry having been submitted by the Lessor to the Lessee, any settlement statement for equipment rental and/or driver's wages, shall be considered correct and final.

4. Before settlement for the equipment rental, all known expenses of operation, including but not limited to rate errors necessitating charge backs, cost of labor connected with the loading or unloading of the vehicle, and all expenses of a like or similar character growing out of the operation of the equipment, shall be deducted from the equipment earnings, and if any such charges are later discovered, particularly charge backs for rate errors, the same shall be deducted from subsequent settlements for equipment earnings. And to secure the payment of any such charges or amounts due the Lessee, a cash bond or reserve in the sum of ($300.00) shall be required from the Lessor which bond shall be paid by deducting from the equipment earnings the sum of $20.00 each pay period from the beginning of the lease until the amount of the bond has been deposited. This bond shall also be used to pay for any and all damages to the property of the Lessee, either owned or leased by the Lessee, other than the equipment listed in this equipment lease agreement, these damages resulting from negligence of the driver and/or owner of the equipment listed in this equipment lease agreement. This bond shall be held by the company for a minimum period of ninety (90) days after the cancellation or expiration of the lease. However, the release of the bond as herein provided shall in no way relieve the Lessor of his liability to the Lessee for any amounts which may thereafter be determined to be due to the Lessee as a result of such charge backs or other expenses.

5. The Lessor shall be held responsible for all loss, shortage or damage of cargo which is the result of the operation of the Lessor's equipment while it is in a faulty or improper condition, also any loss, shortage or damage of cargo which is the result of the driver's carelessness or negligence.

6. For the duration of this lease the equipment shall be driven by a duly and properly qualified driver. Provided further, that only a driver first approved and found duly qualified by the Lessee shall be permitted to drive the equipment at any time, and no change in drivers shall be made until approved by the Lessee.

7. Said equipment shall be and remain under the complete control of the Lessee for the duration of this lease and the driver of said equipment shall be considered the employee of the Lessee. However, the Lessor shall be solely liable and responsible for any and all judgments, fines, costs and expenses, including bail bond costs and attorneys fees, levied against either the Lessor or Lessee as a result of the violation of any criminal, traffic or weight law of any state or municipality committed by the Lessor or his drivers, and the Lessor agrees to indemnify and save the Lessee harmless against any and all such costs and expenses.

8. Lessee shall maintain Public Liability and Property Damage insurance as well as Workmen's Compensation insurance and agrees to hold Lessor harmless from any such claim while said equipment is in the actual service of the Lessee; however, Lessor shall maintain at his own expense Public Liability and Property Damage insurance and present proof of such coverage from his Insurance Carrier which shall be effective while the equipment is parked, deadheading, bobtailing or otherwise being operated in any manner other than under or pursuant to specific dispatch instructions from the Lessee; and the Lessor will save Lessee harmless from any loss, claim or liability while the equipment, or either unit thereof is so used or employed. This shall be construed to mean that the Lessee will not be responsible for Public Liability, Property Damage, Workmen's Compensation or Cargo insurance when the equipment is being used other than in connection with the transportation of freight under the authority and with the authorization of the Lessee, or when the same is being used in any manner except under and pursuant to dispatch instructions of the Lessee.

9. All Equipment Lease Agreements executed in the State of Indiana shall be conclusively presumed to be Indiana contracts, and all accidents resulting in injuries to a Lessor or his driver shall be compensable, if at all, insofar as Lessee is concerned, only under and pursuant to the terms and provisions of the Indiana Workmen's Compensation Law, irrespective of the residency or citizenship of the Lessor or driver or the place of the accident out of which the injury arises.

10. Painting and lettering of Lessor's equipment in the current design will be effected immediately after the signing of the Equipment Lease Agreement, without reservation, at Lessor's expense.

11. Termination of the Lease Agreement at any time and for whatever cause will be immediately followed by the removal within twenty-four hours of the name "Brada Miller Freight System, Inc.," all permit numbers, and other signs concerning or pertaining to operations for Brada Miller Freight System, Inc., from the Unit(s) leased.

Dated at Detroit Michigan this 16th day of November, 1967

BRADA MILLER FREIGHT SYSTEM, INC.

By _____ (Lessee)

_____ (Lessor)

By _____ (Agent)

FORM 1025 REV. 7-63 SHEARER PRINTING SER.

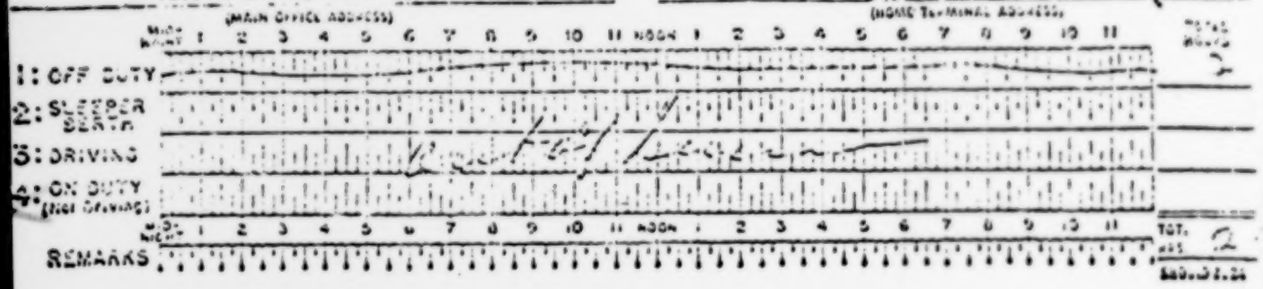
EXHIBIT 1-B

BEST COPY AVAILABLE

0 (TOTAL MILES DRIVING TODAY) Howard W. Hardt (DRIVER'S SIGNATURE IN FULL)

BRADA MILLER FREIGHT SYSTEM, INC. (NAME OF CARRIER) (NAME OF CO-DRIVER)

1210 S. UNION, KOKOMO, IND. (MAIN OFFICE ADDRESS) (HOME TERMINAL ADDRESS)



NO DOCUMENT

Shipping document number, or name of shipper & commodity information required by Section 395.8 (b) — Check the time & enter the name of place where you reported & were relieved from work & when & where each change of duty occurred. Explain entries made pursuant to Section 395.8 (d).

IMPORTANT — Falsification of any of failure to make all entries full and true, can subject you to prosecution by the Federal Government under the Interstate Commerce Act & Motor Carrier Safety Regulations. Explain emergency deviation for any excess driving of weekly time on reverse side of log . . . See items of instruction on outside back cover of this log.

TO:

(STARTING POINT OR PLACE) USE TIME STANDARD OF HOME TERMINAL (DESTINATION OR TURN AROUND POINT OR PLACE)

PREVIOUS LOGS MUST BE TURNED IN TO MIDNIGHT OF PRECEDING DAY BEFORE DEPARTURE FROM ANY TERMINAL

NOTE: IF LEASED OR INTERCHANGED TO OTHER MOTOR CARRIERS — WRITE NAME OF EACH CARRIER AT TIME MARKERS UNDER "REMARKS" TO SHOW TIME SPENT IN THEIR SER...

EXHIBIT 2-A

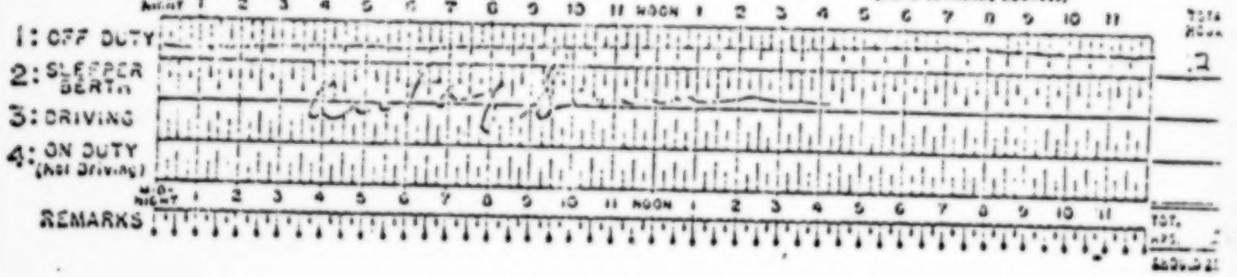
10986-20 DRIVER'S DAILY LOG (One calendar day - 24 hours)

(MONTH) (DAY) (YEAR) (TOTAL MILEAGE TODAY) I CERTIFY THESE ENTRIES ARE TRUE AND CORRECT: (DRIVER'S SIGNATURE IN FULL) Vehicle Numbers (Show all)

(TOTAL MILES DRIVING TODAY)

BRADA MILLER FREIGHT SYSTEM, INC. (NAME OF CARRIER) (NAME OF CO-DRIVER)

1210 S. UNION, KOKOMO, IND. (MAIN OFFICE ADDRESS) (HOME TERMINAL ADDRESS)



SHIPPING DOCUMENT

NO.:

Shipping document number, or name of shipper & commodity information required by Section 395.8 (b) — Check the time & enter the name of place where you reported & were relieved from work & when & where each change of duty occurred. Explain entries made pursuant to Section 395.8 (d).

IMPORTANT — Falsification of any of failure to make all entries full and true, can subject you to prosecution by the Federal Government under the Interstate Commerce Act & Motor Carrier Safety Regulations. Explain emergency deviation for any excess driving of weekly time on reverse side of log . . . See items of instruction on outside back cover of this log.

FROM: TO:

(STARTING POINT OR PLACE) USE TIME STANDARD OF HOME TERMINAL (DESTINATION OR TURN AROUND POINT OR PLACE)

PREVIOUS LOGS MUST BE TURNED IN TO MIDNIGHT OF PRECEDING DAY BEFORE DEPARTURE FROM ANY TERMINAL

NOTE: IF LEASED OR INTERCHANGED TO OTHER MOTOR CARRIERS — WRITE NAME OF EACH CARRIER AT TIME MARKERS UNDER "REMARKS" TO SHOW TIME SPENT IN THEIR

EXHIBIT 2-B

(Vehicle) (Date) (Terminal) (Home Terminal Official Time)

(Total Miles Driving Today)

(Driver's Signature in Full)

ERADA MILLER FREIGHT SYSTEM, INC.

(Name of Carrier)

(Name of Co-Driver)

1210 S. UNION, KOKOMO, IND.

(Main Office Address)

(Home Terminal Address)

	Mid-Night 1	2	3	4	5	6	7	8	9	10	11	Noon 1	2	3	4	5	6	7	8	9	10	11	Total Hours
1: Off Duty																							2
2: Sleeper Berth																							
3: Driving																							
4: On Duty (Not Driving)																							
	Mid-Night 1	2	3	4	5	6	7	8	9	10	11	Noon 1	2	3	4	5	6	7	8	9	10	11	Total Hours
Remarks																							2

Shipping Document

No.:

Show all intermediate points, or name of shipper & commodity information required by Section 195.8 (b) — Check the time & enter the name of place where you reported & were relieved from work & where each change of duty occurred. Explain engine hours — Section 195.8 (d).

IMPORTANT — Falsification of log or failure to make all entries full and true, can subject you to prosecution by the Federal Government under the Interstate Commerce Act . . . Any current to last step . . . Explain emergency omission for any unless driving or weekly time on reverse side of log . . . See items of instruction on outside back cover of log.

FROM: — TO:

(Starting Point or Place) Use Time Standard of Home Terminal (Destination or Turn Around Point or Place)

Deviation from Duty May Be Needed in Addition to Midnight or Beginning Day Records Required from Any Terminal

EXHIBIT 2-C

Transamerican Freight Li[illegible], Inc., Detroit, Michigan

LEASE AGREEMENT WITH AUTHORIZED CARRIERS

No. 2—Transfer and Bill of Sale to be sent to Dept. — Attach to Pay Copy of Sched.

THIS AGREEMENT, made and entered into this 19 th. day of January A.D. 19 68 by and between Transamerican Freight Lines, Inc., Detroit, Michigan, a corporation, hereinafter referred to as the First Party, and Erada Miller Freight System, Inc., 1210 South Union Ave. of the City of Kokomo, State of Indiana hereinafter referred to as the Second Party.

WITNESSETH: Whereas, First and Second Parties are authorized carriers as that term is defined in the Rules and Regulations of the Interstate Commerce Commission pertaining to the leasing and interchange of vehicles by motor carriers, and

WHEREAS, the Second Party is the owner of motor vehicle equipment regularly used by it which it desires to lease to the First Party, or the use of which is otherwise required,

NOW, THEREFORE, in consideration of the compensation to be paid by First Party to Second Party and the mutual promises, agreements and conditions herein contained, it is hereby agreed as follows:

1. The Second Party hereby leases to the First Party the following motor vehicle equipment to be operated by Walt Hendricks, owner & driver, Inc. (Name of Driver) a driver who is employed by the Second Party to operate said equipment on the public highways of the United States, for the purpose of transporting property in interstate commerce for the duration of one (1) single trip beginning at [illegible] A.M. to 1:00 P.M. on Jan. 19, 1968, at which time title to said equipment shall revert to Second Party or its agent unless First Party elects to lease such equipment for another trip. First Party may transport the same in its name from the place or places Second Party may designate in the City of Detroit, State of Michigan to Kansas City, Kan. and State of Kansas or Missouri or both, or any other point to which it is authorized to operate.

DESCRIPTION OF VEHICLES

Type of Equipment	No. of Axles	Make	Year	Engine No.	Serial No.	Weight	License Plates: State	License Plates: Number
tractor	3	Intl	1963	FD 218328		14220	Mich.	9329 CC
trailer	2	Brown	1965	TCD 663		11790	Mich.	900-214

First Party agrees to pay Second Party and Second Party agrees to accept therefor the following compensation:

BASIS OF PAY FOR TRIP REPORT NUMBER 201 - 4716½

RENTAL:

_____ MILES AT _____ PER MILE
_____ POUNDS AT _____ PER TON
73 % OF $ Gross REVENUE } $ _____
OTHER _____ $ _____
TOTAL $ _____

LESSOR'S I.C.C. DOCKET NO.
MC29079

TRANSAMERICAN PLACARD SERIAL NUMBER 9329 HAS BEEN AFFIXED TO SAID VEHICLE

2. Second Party further agrees that it will bear the entire cost of operating said motor vehicle equipment, and that it and all times said motor vehicle equipment or good maintenance, upkeep and repair, and will employ said motor vehicle equipment to be operated only by a competent employee of the Second Party, or which event said employee of the Second Party shall be the employee of the Second Party in the pursuance of his duties and not the employee or agent of the First Party. It is hereby expressly understood and agreed that nothing herein is to be construed as constituting Second Party, its agents, servants or employees, as the servant, employee or representative of the First Party.

3. It is mutually understood and agreed, that the First Party during the term of this lease shall have the control and responsibility for the operations of said equipment in respect to the public and the Interstate Commerce Commission for such period that said equipment is to be used under the terms of this lease as provided in Paragraph 1 hereof.

4. Second Party further agrees that in the operation of said motor vehicle equipment it will comply with all the rules and regulations of the Bureau of Motor Carriers of the Interstate Commerce Commission, and the applicable local and highway laws, public utility commissions and of any other duly constituted state authority that it will maintain all pertinent rules and regulations governing the hours of service of drivers and helpers, and all of said rules, laws and regulations of any governmental authority relating to the operation upon the public highways of said motor vehicle equipment that it will comply with the Social Security laws, unemployment insurance, old age insurance, or other social security payments that may become due by reason of the payment of wages to drivers or helpers, and all laws or regulations now or hereafter enacted or promulgated by legally constituted authorities in respect thereto.

5. It is mutually agreed that responsibility of First Party resulting from control and use of said equipment pursuant to Paragraph 4 shall in no way abrogate the rights of the First Party to use said equipment and indemnity from the Second Party as set out in Paragraph 9 hereof.

6. It is further agreed that Second Party represents that its employee, agent or servant executing this agreement has full authority to act on the behalf and represents that said person is competent and qualified to perform the vehicle inspections required by the Interstate Commerce Commission regulations.

7. Second Party further agrees to procure and maintain at its own expense adequate fire, theft, comprehensive collision insurance with respect to the aforesaid motor vehicle equipment, and to additional and First Party harmless from any and all loss, damage or expense arising out of fire, theft, casualties, accident or other casualty of every kind whatsoever to the units the Second Party shall operate designated by Second Party while operating said motor vehicle equipment and during the operation thereof while in pursuit of property belonging to or owned by the First Party, and also insure damaged or lost because of the fault or negligence of the Second Party or the other designated or said motor Party. In which Party agrees to pay First Party for loss of damage as set. The Second Party further agrees to indemnify and to hold the First Party harmless from all loss and costs to property belonging to or owned by the First Party and from all losses and claims for damage that shall be occasioned or caused by the negligence or fault of the Second Party or the driver or operator of said equipment used by the Second Party.

8. It is mutually understood and agreed by and between the parties hereto that First Party shall not be responsible to Second Party, its agents, servants and employees, nor any negligence of the Second Party, its agents, servants or employees, or for any loss, damage, injury or expense arising out of the use of or operation of said equipment by Second Party in carrying out the terms of this Agreement. Second Party hereby indemnifies and save harmless First Party from any and all claims, suits, losses, liens or other expenses arising out of, in connection with or growing out of injuries because of injury to any person or persons (including the property statement of which may at any time be brought against First Party for injuries sustained, including death resulting therefrom, or damage to property caused or alleged to have been caused, by any and all acts but only to property belonging to First Party, its agents, servants or employees, and for damage to cargo resulting from any reason use or unlawful use of Second Party, its agents, servants or employees. It is mutually understood and agreed that Second Party will insure, at its own cost and expense, by and all acts but only to property belonging to First Party for injuries sustained, including death resulting therefrom, or damage to property caused or alleged to have been caused, by any person employed by Second Party, while engaged in the performance of any of the terms and conditions of this Agreement, and for any notice loss arising from any negligence or misconduct on the part of Second Party, its agents, servants and employees. Nothing in this Paragraph 8 contained shall be construed to be inconsistent with the meaning of the First Part to the public in connection with the use of said equipment under this Agreement.

9. It is mutually understood and agreed that upon the termination of this Agreement, the Second Party will forthwith remove from said motor vehicle equipment all power, rights or other property belonging to First Party, and deliver the same to said First Party, together with any other property of First Party that may be then in the possession of Second Party's collections and C.O.D. charges.

First Party has caused an inspection to be made of the aforesaid motor vehicle equipment, the results of which have been satisfactory upon the report attached to a copy of this lease, which that the same is equipped with all parts and accessories necessary for the safe operation in accordance with the safety Regulations of the Interstate Commerce Commission.

The First Party, by signing this Agreement acknowledges receipt of the motor vehicle equipment hereinbefore described in Paragraph 1 above on the date and at the time thereon set forth.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed in quadruplicate on the date set forth below.

Jan. 19, 1968

AMERICAN FREIGHT LINES, INC.
17515 Dix Road - Melvindale, Michigan
(Detroit, Michigan area)

By E. Emery
(First Party)

Erada Miller Freight System, Inc.
(Name of Motor Vehicle Co. Owner)

By Harold D. Hendricks
(Authorized Agent) (Second Party)

Rev. 11-61

EXHIBIT 3 -41-

EXHIBIT 3

In the United States District Court
Southern District of Illinois
Southern Division

(Title omitted in printing)

Deposition of Donovan F. Rayl taken July 2, 1969

[2] **DONOVAN F. RAYL,**

a witness named in the agreement, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. Voorhees

Q. What is your name?

A. Donovan F. Rayl.

Q. Where do you live Mr. Rayl?

A. 120 East Boulevard; Kokomo, Indiana.

Q. By whom are you employed?

A. Brada Miller Freight System, Inc.

Q. What is your job with Brada Miller?

A. Vice-president.

Q. What do your duties consist of in a broad sense?

A. Mainly accidents and insurance.

Q. How long have you been with Brada Miller?

A. Seventeen years.

Q. How long have you been vice-president?

A. Ten years.

Q. Have your duties since you have been with them more or less encompassed the same areas or the same scope?

A. I have held different capacities with the company: operations department, personnel department, safety and then into the insurance and accidents.

[3] Q. Prior to going with Brada Miller, were you employed by any other freight lines?

A. No.

Q. What were you before your going with Brada Miller?

A. I was with Standard Oil of Indiana.

Q. Since you have been with Brada Miller, have you been in Kokomo the entire time?

A. Yes, sir.

Q. Have your duties ever taken you out of Kokomo for any extended period? I don't mean just a two or three day trip or something.

A. No, no.

Q. In your company, are records kept of trips which are made by your equipment, either owned or leased equipment?

A. Yes.

Q. Can you tell me what kind of records these are.

A. Well, we are required, of course, to keep the driver's logs for one year, which reflects the trips he made; and we have our own company documents, manifests covering the driver's trip; and of course we have our rolls, our revenue rolls, which covers shipments and charges.

Q. Can you tell me who would be in charge of these different records.

A. Your different departments would have the records.

Q. Can you go through that and tell me who would have **[4]** the records.

A. The paymaster would have the pay records; that is presently Charles Burnett.

Q. Is he in Kokomo?

A. Yes.

Q. Do you know his address?

A. I do know. It is the Frontenelle Apartments. The logs are under Mr. Freddie Barnes, who is the safety director. He also lives at the Frontenelle Apartments. Those two people would control those documents.

Q. Who would be in charge of the financial records regarding the payment to the company for various trips and shipments?

A. That would be our vice-president for finance, Mr. William Jones.

Q. Do you have any idea what his address is?

A. It is Rural Route, Russiaville, Indiana.

Q. Is that a suburb of Kokomo?

A. Yes, it is about five miles—ten miles.

Q. Who would be in charge of the filing and handling of any tax forms and reports?

A. Mr. Jones, also, would have those, our vice-president for finance.

Q. By the way, did you bring any records with you that **[5]** would pertain to any of the relations between Brada Miller and the Mawbys and Mr. Hardwick.

A. Our attorney has copies of our records; they have been furnished to him.

Q. Other than those, you didn't bring any along with you?

A. No.

Q. In the business of operating the Brada Miller Company—by the way, would you describe their business very briefly.

A. Our company is classified as an irregular route common carrier, which is granted under the authority of Interstate Commerce Commission Motor Carrier No. 29079. "Irregular route" means you can go anyplace; "Common Carrier" means you can carry any product within our four-state area.

Q. What states do those include?

A. Indiana, Ohio, Illinois and Michigan.

Q. Do you include Missouri?

A. St. Louis is within our authority, and we have some other side authority like Fulton, Missouri.

Q. Did you ever carry freight outside of this area or bring it back to places outside of this area?

A. No, we stay within our scope. If it would be a case of going outside, it would be the exception.

[6] Q. Of the equipment you use, could you tell me; do you own any of it yourselves?

A. We own some of the trailers; none of the power units.

Q. Who are the power units owned by?

A. The power units are owned by parties other than the company, classified as brokers. You have fleet brokers and individual brokers.

Q. Could you tell me what those brokers would be.

A. An individual broker would be a driver-owner; a fleet broker would have one or more units not driven by himself.

Q. You say all of your power units are in this class?

A. Yes. We have some under lease at a given time.

Q. On the average, how many power units would you have under lease at a given time?

A. Seven hundred.

Q. Seventy?

A. Seven hundred.

Q. Do you have under lease certain of the trailers also?

A. Yes, we do.

Q. But you mentioned you did own some of your own?

A. Yes, we do, and we rent some.

Q. Do you—when you're talking about renting these power units or leasing them, are you talking in the broad **[7]** sense on what is considered the permanent lease for a year or more?

A. Yes, sir.

Q. Do you, in obtaining equipment to carry your loads ever trip-lease equipment that belonged to either other companies or individuals, on single trips?

A. We have on occasion augmented our equipment by trip-leasing.

Q. On the other hand, did you ever, with your equipment, trip-lease it to another company?

A. On occasion. It happens on approval of the company. Basically, we have enough business to keep our men busy.

Q. Do you know whether or not, let's say over the last three or four years, you have trip-leased any equipment to Transamerican Freight Lines?

A. I do not know.

Q. You are familiar with Transamerican.

A. I know them, yes.

Q. Who would know whether you had made any trip-leases to Transamerican?

A. I'd say the paymaster would know, Mr. Burnett.

Q. Would it be your practice to keep any records of the trip-leases, other than the payments that you receive?

A. If one of our men would trip-lease to another company, he would be paid through our payroll department, so there would **[8]** have to be records.

Q. Now, when you say, "if a man," you're talking about a lessor?

A. The equipment; the driver and equipment.

Q. When you're talking about paying the driver of the equipment of yours, how would this work? How do you handle this when the driver is driving for—I think you called it a fleet lessor.

A. Well, there is a union contract agreement that spells out how you pay your men in accordance with the Teamsters Union contract.

Q. When a fleet lessor is leasing equipment to you that he owns but doesn't drive himself, does he usually find the driver to drive the equipment?

A. Yes, the normal practice is: he submits the driver for approval.

Q. That was the next question I was going to ask you, so that the fleet lessor will find the driver to drive the equipment and submit the driver to you for your approval?

A. Yes.

Q. As a normal practice, who pays that driver?

A. He is an employee of the lessee of the equipment then.

Q. You would be the lessee?

[9] A. Yes.

Q. Is he paid a salary by Brada Miller?

A. He is paid in conformance with the Teamsters contract, which is a percentage of the contract.

Q. A percentage of the freight from the trip?

A. The revenue haul.

Q. Does the situation ever exist where he is paid by the lessor?

A. Not to my knowledge; he is not an employee of his.

Q. So your agreement with the lessor provides usually for payment of a certain percentage to the lessor to cover the leasing of the equipment.

A. Yes.

Q. And then another percentage to the driver to cover the driver's pay under the union contract.

A. That is not part of the agreement with the lessor.

Q. I beg your pardon, but that's the way the situation is normally handled?

A. Yes.

Q. Are you familiar with the lease of equipment that your company entered into with the—I think the name was May Mawby from Detroit?

A. Yes, sir.

Q. And are you familiar with—I think you attached a **[10]** copy of the leases to May Mawby to the affidavit which has been filed in court, the affidavit which you signed and swore to.

A. Yes, we did.

Q. Although the lease will speak for itself, this was what is known in the business as a permanent lease?

A. More than 30 days or a permanent lease.

Q. The lease in fact was for a year?

A. That's correct.

Q. From sometime in November 1967 up until November 1968?

A. Yes.

Q. Can you tell me who signed that lease on behalf of Brada Miller?

A. The signature appears to be——

Mr. Reinert: Let the record show my objection. Of course, we don't concede it is signed on behalf of Brada Miller properly. You may answer, if you can find it. Which lease are you talking about, by way of which exhibit?

Mr. Voorhees: Actually, I handed him your motion for a summary judgment; it was open to Exhibit 1-A. I believe there are two of them in there, both of which appear to have the same signature.

Mr. Reinert: Let the record show my objection is **[11]** withdrawn.

A. The signature appears to be that of Mr. Tobias.

Q. Who is he?

A. Our terminal manager at Detroit, Michigan.

Q. Do you recall or have any knowledge of who it was that was the driver of this equipment which was leased by Brada

Miller from the Mawbys? Do you know whether or not it was Howard Hardwick?

A. It was Howard Hardwick.

Q. Are you familiar with Howard Hardwick at all?

A. Not in person. I don't think I have ever met him.

Q. Do you know whether or not these leases of this equipment from May Mawby have ever been terminated?

A. Yes, I am sure they have. I don't know the date, but I am sure they have been terminated.

Q. Do you have any approximation of the date?

A. I will say as an approximation, I think it was January 30th or somewhere in that area, of 1968.

Q. Who would have the records that would reflect that? A. That would be in our permit section in Kokomo, which is under the direction of Mr. Ken Harp, H-a-r-p.

Q. What is his title?

A. His title is industrial relations director.

Q. Do you know his address?

A. The Frontenelle Apartments.

[12] Mr. Voorhees: Off the record.

(Discussion off the record.)

Q. Do you know how or in what manner the lease was terminated, or the leases, since there appear to be two of them, one for the power unit and one for the trailer.

A. I think it was on the basis of unavailability.

Q. Do you know if Brada Miller took any action to permanently terminate the lease?

A. Yes, I am sure there was written notice given sometime to effect the termination. I'd say this is our normal method of handling a notice to the lessor that the lease has been terminated.

Q. This would be handled by Mr. Harp?

A. Yes, H-a-r-p, Harp.

Q. You didn't personally do this yourself?

A. No, sir.

Q. Other than the fact that it is your normal method, you don't have any specific knowledge that it was done in this case?

A. I don't have the date, no.

Q. Did you see such a notice sent?

A. No.

Q. What would be the normal practice, the details of cancelling or terminating such a lease with the Mawbys?

A. It could be a verbal agreement between the lessor and the lessee; it could be on written ten-day notice; it **[13]** could be a lack of activity, which you would, in cleaning your files out, you would send a termination notice. As you know, in this business equipment is sometimes unavailable over a period of time. You know it is still unavailable; therefore, you cancel it out, because you know you are not going to use it for your services.

Q. Do you have any knowledge of when the last trip was that this equipment made for Brada Miller?

A. I think it made a trip on January 25th, perhaps from St. Louis to Detroit.

Q. Can you tell me how you were made aware of this.

A. By the driver's log sheets, showing his trip.

Q. You don't have any from St. Louis to Detroit?

A. I said Detroit; I don't know whether—the Michigan area.

Q. By the way, where is Brada Miller's home office?

A. Kokomo, Indiana.

Q. Is their principal place of business there?
A. Yes, sir.

Q. When equipment that is leased to Brada Miller is on a trip, can you tell us who it is that pays for the gas and oil and repairs?

A. The lessor is responsible to maintain the equipment and pay for the operating costs.

Q. So that the lessor, in this instance, would be May Mawby?
[14] A. Yes.

Q. Mr. Rayl, have you a copy of your affidavit by any chance?

A. I do not, no.

Q. All right. I wanted to ask you a few questions about some of the things you say in here. Off the record.

(Discussion off the record.)

Q. You have before you now a copy of the affidavit which you have signed and sworn to. I think it is dated November 22, 1968; is that right?

A. Yes, sir.

Q. In there, of course, you refer to these leases which we have just been discussing and about which I have been asking you questions, the lease agreements with May Mawby; and you identified those. That is the equipment that they cover in Paragraph 2 of your affidavit. Now, refer to Paragraph 3 for a moment, and there you see that Howard Hardwick, the driver of the equipment, reported to the office of Brada Miller at Detroit, Michigan, certain things. Can you tell me how this information got to you?

A. Mr. Tobias, who is our Detroit terminal manager, advised me that Mr. Hardwick reported that this equipment was out of service.

Q. Do any records reflect this?

A. Not to my knowledge—well, the log, the driver's **[15]** daily log sheet reflects out of service.

Q. Does the log reflect anything about a repair shop having it for several days?

A. No.

Q. Do you have any personal knowledge about the information there, other than what Mr. Tobias told you?

A. Not regarding the repair shop. I do work on the out of service or the log, which in turn reflects it was out of service or something was wrong with the equipment.

Q. The logs that you mentioned came to you from Mr. Tobias?

A. They came to our central office log department in the normal manner. The drivers are instructed to turn them in daily. They could have been turned in at Detroit or any location; I don't know how they came to Kokomo.

Q. You have already mentioned the person in charge of these logs.

A. Mr. Barnes.

Q. As far as the equipment requiring repairs and being in the repair shop, you don't have any knowledge yourself of this.

A. I do not.

Q. And as far as the fact that Mr. Hardwick may have told somebody that the equipment would be out of service several days, you don't have any personal knowledge of what he may have told somebody.

A. He did not tell me personally.

[16] Q. Now, refer over to the next page of that affidavit, Mr. Rayl, or have you already turned the page?

A. Yes, I have.

Q. You are ahead of me. In the fourth paragraph, when you say that Mr. Hardwick did certain things without the knowledge of or authority of Brada Miller, you don't have personal knowledge yourself of what he may have told someone else or of what someone else may have told him; isn't this correct?

Mr. Reinert: Would you explain to the witness what you mean by "personal knowledge."

Q. When I talk about "personal knowledge," I'm talking about what you, yourself, know to be a fact and not what you have learned by hearsay. Do you know what hearsay is?

A. Yes, sir. My answer would have to be no, because I did not talk to Mr. Hardwick personally.

Q. Referring down to the seventh paragraph of your affidavit, which starts on the bottom of the second page and then carries on over to the top of the third page, you mentioned in there that Mr. Hardwick arranged—whatever that means—with a person known as Wesley Mawby to do certain things. What I am after is as to your knowledge of what Mr. Hardwick did, and I am wondering how you learned of this. Is this again hearsay as far as you are concerned?

[17] A. Yes, sir.

Q. So you don't have yourself personal knowledge of any arrangement between Mr. Hardwick and Wesley Mawby?

A. That's correct.

Q. Nor of any arrangements regarding the equipment and Transamerican?

A. Other than hearsay from Roy Christensen and house counsel.

Q. When drivers of equipment for Brada Miller are authorized to make trip-leases with another company—as you said just a few moments ago, sometimes they were authorized?

A. I said it would be on a rare occasion.

Q. Do you know what kind of authorization it is customary for the company to give?

A. Their instructions are that there has to be written authorization.

Q. Do you instruct all of your drivers about this?

A. We instruct all of our personnel.

Q. Would your personnel include your drivers?

A. Yes. In their hiring process, they are instructed that they are employed by Brada Miller.

Q. Do you have any type of written form that you extend to them on occasion, authorizing trip-leases?

A. No.

[18] Q. In what manner do you give written authorization?

A. It would be from the individual carrier, the person in charge of the terminal or the terminal manager would have to give authorization to the other carrier that they can utilize this equipment.

Q. Are you familiar with any notifications sent by Brada Miller to Transamerican since this accident regarding trip-leasing?

A. Yes, sir.

Q. Could you tell us what that is.

A. I did not put this bulletin out myself, but I can say that I know that Transamerican received notice that they were not to trip-lease from any of our drivers without written approval. That is the contract, as I understand it; I do not have it in front of me.

Q. Who would have it?

A. Mr. Barnes.

Q. Do you know approximately when this notice was sent?

A. I don't.

Q. Do you recall that it has been since the instigation of this lawsuit?

A. I can't answer that; I don't know the date.

Q. Do you know whose licenses were on the equipment that **[19]** you leased from the Mawbys during the term of the lease?

A. It is my understanding that it was in the name of May Mawby.

Q. This would be the license plate that we are familiar with that would be on the back?

A. Yes, the license plate.

Q. That would be on both the trailer and the tractor?

A. And the tractor.

Q. Do you know—did Brada Miller furnish its name plates and decals for the equipment?

A. Yes, sir.

Q. Do you know if this was placed on the equipment?

A. I'm sure it was, in the normal manner.

Q. (By Mr. Koester) Was it on at the time of the accident on January 22nd?

Mr. Voorhees: You can ask him that.

Q. (By Mr. Voorhees) Do you know, were Brada Miller's permit and permit numbers affixed to the equipment?

A. The identification included the operating authority numbers of the company, yes.

Mr. Voorhees: I think that's all.

[20] **Cross-Examination**

By Mr. Koester

Q. Were the—you said this lease agreement was between November 1967 and November 1968 that you folks had with May Mawby.

A. The effective date was November 1st on the tractor; I think it was November 16th on the trailer.

Q. Then was that equipment still under lease with Brada Miller and the Mawbys on January 22, 1968? Was there a new lease, or did that lease run out then?

A. There was no new lease.

Q. Was there any kind of a lease between Brada Miller and the Mawbys on January 22, 1968?

A. Yes.

Q. What was it?

A. The one attached to the affidavit.

Q. You said it was originally taken out November 2nd or November 1st, approximately.

A. It was a one-year lease. A lease of 30 days or more has an expiration date of one year, but it can be cancelled on 30-days notice.

Q. Did this 30 days expire?

A. No.

Q. So that the lease with Brada Miller and the Mawbys was in effect on January 22, 1968.

A. With the exception that they had violated it, which **[21]** would have cancelled it.

Q. If there were a violation, it wouldn't have been in effect?

A. No, sir.

Mr. Voorhees: I will object to the answer as stating Mr. Rayl's personal opinion as to the effect of a legal violation of the lease, and I move the answer be stricken from the record.

Q. Assuming for the purpose of this question that there were no violations of the lease, as you have alleged there was, without admitting that there was or wasn't for the purpose of this question and assuming that there was no violation, at the time of this accident was Hardwick an employee of Brada Miller at

that time? That is January 22, 1968, assuming there was no violation.

Mr. Reinert: Let the record show our objections to questions of this nature. I think all objections are preserved.

A. I'd say the man was not our employee, because he had already violated the terms of his employment.

Q. Would that violation cancel his employment?

A. Yes, he would be working for another employer.

Q. Would that be the terms of your contract with employees: if they violate the terms of their employment, they are not your employees?

A. Yes, it is.

[22] Q. Do you have any personal knowledge of what alleged violation Mr. Hardwick committed?

A. The two violations would be unauthorized use of equipment, and secondly, he was working for another person. He was an employee of Brada Miller and not any other party. Once he took employment elsewhere, he would no longer be our employee. He could not serve two masters at the same time.

Q. He had been employed by you?

A. Yes, sir.

Q. The equipment was leased through you?

A. Yes, sir.

Q. Are you saying he had no authority to enter into a trip-lease with Transamerican?

A. Yes, sir; he did that on his own and not with our authority.

Q. Prior to this accident on January 22, 1968, was it your usual practice to furnish your men with some kind of written authorization or statement that they were authorized to enter into a trip-lease with another company?

A. It is our stated policy that they are not authorized to enter into a trip-lease with another company.

Q. Would they be given some authority to carry this authorization?

A. Let's clear this up: I think your original question was: would they be given a written authorization to carry to **[23]** enter into trip-leases.

Q. That is your interpretation. My question was: when you gave them authority to enter into a trip-lease with another company—that does occur; does it not?

A. Yes, sir.

Q. On those occasions, did you give them some kind of form? Would that be prepared by the terminal of the firm?

A. It would be on a written form.

Q. Do you personally know of any occasion where the drivers entered into trip-leases with another company without a written authorization?

A. I wouldn't have knowledge of any occasion.

Q. Do you personally have knowledge that all of your drivers had written authorizations to enter into trip-leases with another company when they did?

A. No.

Q. Did you ever publish a notice to your drivers prior to January 22, 1968, that they would not enter into trip-leases with another company unless they had a written authorization from your company?

A. It is spelled out in the I.C.C. regulations in Ex Parte 43. It is common knowledge through the United States that you do have to have authority from the carrier leasing the equipment.

[24] Q. What I am trying to get at is how evidence of that authority were evidenced to another carrier when it is entered into. Is there a notice to the other companies? At that time were those companies notified that the driver must present them with something in writing from your company before the driver has written authority to enter into a written agreement?

A. I would say that would be up to the individuals or the companies' authority, of what they want to accept.

Q. Is there anything in the I.C.C. regulations that the driver has the right to enter into such an agreement and not present that written notice to the other company?

A. I am no authority on that; I wouldn't know.

Q. How would Transamerican know that your driver was not cloaked with that authority to enter into trip-leases without a written agreement? How would they know they didn't have that authority?

A. I'd say he didn't have that authority. I would say that they know, unless they had some means to feel, or that they felt this practice was permissible by the other company.

Q. Was any disciplinary action taken against Driver Hardwick for this unauthorized act?

A. No. We had no knowledge of the deed when he left our employ on June 1, 1968. He wasn't our employee when our first knowledge came. It would have been a waste of **[25]** paperwork to do anything then.

Mr. Koester: Off the record.

(Discussion off the record.)

Q. Was your name or your trucking company's name—that is, Brada Miller's name—on that tractor at the time of this accident on January 22, 1968?

A. I would have no knowledge.

Q. You don't know?

A. No, I don't know.

Q. Was that tractor then carrying an operator's authority number or permit number on the equipment at the time of this accident on January 22, 1968?

A. I would have no knowledge of that.

Q. If you do give the authority to a driver to enter into a trip-lease agreement, the manner in which he would enter into this agreement and the kind of lease he would sign and the kind of signature he would make: was that all the same as was made by this Hardwick fellow? In other words, he wouldn't sign it as an agent for the company or have any authority to, would he?

A. I would think so. Agency would be given with the written authority.

Q. (By Mr. Reinert) But your assumption is that he would sign his name.

A. I would think so.

[26] Q. (By Mr. Koester) You haven't seen them signed in any other way?

A. I wouldn't think. I haven't seen a driver write it "Per authorization from D. F. Rayl" or anything like that.

Q. Was Hardwick paid anything by you other than the percentage of each trip when he operated as your employee?

A. That was all he was paid, a percentage of each trip. I might clarify that and say that he is paid in conformance with the union contract; there might be a provision in there for his motel bill or something like that, where he would be reimbursed.

Q. The question I was asking: I don't think I have seen drivers with a payload from you where you would make any profit from that load and he would be paid nothing.

A. That's right.

Mr. Koester: I have no further questions.

Further Cross-Examination

By Mr. Reinert

Q. Mr. Rayl, I just have a very few questions. Transamerican could have verified any authorization that Mr. Hardwick repre-

sented he had, by simply calling the management of your company; couldn't they?

A. Yes.

Q. Was that done?

A. No.

Mr. Reinert: I have no further questions.

[27] Redirect Examination

By Mr. Voorhees

Q. Mr. Rayl, during the course of our questions and answers, you have mentioned the union contract as being controlling on the pay of the men. Do you have a copy of that? I guess that would be back in your home office, wouldn't it?

A. No, I don't carry a copy of it.

Q. I would assume that the different drivers would have their own copies.

A. It would be their privilege; they are members, so they would have copies.

Q. Where would a copy of that contract be available?

A. On this particular driver, I assume from Local No. 299 of the Teamsters at Detroit, Michigan.

Q. Other than the written contract you have with the Teamsters, is there any written agreement or employment contract between you and the drivers?

A. No.

Q. Do you issue any written rules or instructions to the drivers?

A. They are given instructions during their hiring process. There is probably some written material at the time that is given to them and much verbal instruction.

Q. When you mentioned the hiring process, what are you talking about?

[28] A. When a man is placed in our employment, he goes through an indoctrination process where he is made familiar with our company and our rules and regulations and what is expected of him.

Q. Where was this indoctrination done in this case?

A. Where he was hired; Detroit, Michigan.

Q. You wouldn't go through any indoctrination in Kokomo?

A. No, in this particular case it would be entirely at Detroit.

Q. Who would give this indoctrination?

A. Mr. Tobias.

Q. Do you supply the terminal managers with any written materials that they are to supply your drivers with?

A. They are supplied, yes.

Q. Do you know what that written material is?

A. I do not know completely what it is.

Q. Do you have any information as to what that is?

A. They have the employment application, and they are instructed on the proper usage of the log book.

Q. Is this a written instruction?

A. Written and verbal. I say it is written, because the log book has written instructions telling you how to use it, and I say verbally because you go through the regulations and show him our orders and instructions and how to keep out of **[29]** trouble, and the pay applications; what they look like, how they are to be completed, and to follow the instructions. Again, he is given the instruction that he is not allowed to go anyplace without a written authorization.

Q. Is this a written instruction to him, or is this an oral instruction to him?

A. I would say both written and verbal; it is part of his instructions.

Q. Have you seen the written forms that Brada Miller follows in giving instructions to drivers?

A. I say I have. I am going back many years to when I was hiring. There had been written instructions when I was hiring, but I don't know what was given to him.

Q. Who would instruct your terminal managers of how they would instruct the drivers?

A. Myself, Mr. Valdon, the president of the company, and Mr. Barnes. We just finished a meeting Sunday, but in our meetings we instruct them and bring them up to date and so on.

Q. Is anybody else in Detroit in charge of the terminal there where Mr. Tobias makes his instructions?

A. The gentleman who is our district manager, Mr. Fred Moore, who is capable of handling Mr. Tobias' duties.

Q. Is the terminal open and operating 24 hours a day?

A. Yes, it is.

[30] Q. Surely Mr. Tobias isn't there 24 hours a day.

A. We don't do any hiring and instructing when he is not there.

Q. Do you know who would be in charge of the terminal when Mr. Tobias is not there?

A. We have several people there, but I wouldn't know their names.

Q. Do you know how long he has been with the company?

A. He has been with us four years.

Q. Has he been in Detroit the entire time?

A. Yes.

Q. Do you know what his experience has been before that?

A. I know he had several years employment in the trucking industry.

Q. Do you know who his employer was?

A. No, I don't.

Q. It wasn't Transamerican?

A. No, I don't know who he worked for.

(Signature of the witness waived by agreement among counsel for the parties.)

In the United States District Court
Southern District of Illinois
Southern Division

(Title omitted in printing)

Deposition of Ronald William Temperley
taken January 30, 1973

[3] RONALD WILLIAM TEMPERLEY

having first been duly sworn, was examined and testified on his oath as follows:

Examination

By Mr. Leritz

Q. Will you state your name, please?

A. Ronald William Temperley, T-e-m-p-e-r-l-e-y.

Q. How old are you?

A. 51.

Q. Where do you live?

A. K-e-n-n-e-t-t Square, Pennsylvania, the address, Deer Path Road, R.D. #2.

Q. What large city is that near?

A. Philadelphia.

Q. How far is it from Philadelphia.

A. Roughly 26 miles.

Q. What is your telephone number at home?

A. 444-1086. The area code is 215.

Q. You are a married man?

A. Yes.

Q. Your wife's name?

A. Barbara.

Q. How long have you lived there?
A. Five months.

Q. Where did you live before that?
[4] A. In Delaware for three months.

Q. By whom are you employed, sir?
A. Transamerican Freight Lines.

Q. Is that a corporation?
A. Yes.

Q. Incorporated in what state?
A. I believe in Delaware.

Q. What is the nature of Transamerican's business?
A. We are in the general commodities, steel and perishable, between various points, we transport these goods.

Q. What is your position with the company?
A. I'm a district field supervisor for the Eastern Region.

Q. What is your business address?
A. 2905 E. Allegheny, Philadelphia, Pennsylvania 19913.

Q. How long have you had that position?
A. Since March 1, last year.

Q. '72?
A. Right.

Q. Okay. Just very briefly, tell me what your duties are?
A. Well, my duties consist of going from terminal to terminal and making sales calls with the various personnel, also checking the records and getting into the various facets of the way they are operating and, if possible, to aid the managers in the field.

Q. How long have you been employed by Transamerican?
[5] A. Seventeen years.

Q. How long have you been in the Philadelphia office?
A. Well, since March 1st—I commuted up there til we moved in June.

Q. Where was your employment before that?

A. Then I was district field supervisor of the Western Region, the Mid-western Region.

Q. Where were you located then?
A. Chicago, I lived in Joliet, Illinois.

Q. How long were you in Chicago?
A. Two years.

Q. Before that what were your duties?
A. Before that?

Q. If not your duties, your position.
A. The same title in Chicago.

Q. Before Chicago?
A. I was in Detroit as a district field supervisor.

Q. For how long were you a district field supervisor in Detroit?
A. About a year, roughly.

Q. Now, Mr. Temperley, this deposition is being taken in a case that arose out of an accident that occurred in Illinois on January 22, 1968. You are familiar with the fact of that accident, are you not?
A. Yes.

Q. Were you employed by Transamerican at that time?
[6] A. Yes.

Q. What was your position with Transamerican?
A. Terminal manager, Detroit Steel Division.

Q. What was your address?
A. At that time, 28799 Brook Circle, Gross Ile, Michigan.

Q. I mean your business address.
A. 17516 Dix Avenue, Melvindale, Michigan.

Q. Is Melvindale a suburb of Detroit?
A. Yes.

Q. How long had you held the position as terminal manager with Detroit Steel Division, prior to January, '68?

A. Well, about twelve years, I believe.

Q. What were your duties as terminal manager?

A. Well, my duties as terminal manager were many. Basically, though, I was on the street in sales. That was the main field of my endeavor.

Q. I presume you were in overall charge of operations at this particular terminal?

A. I was—yes, I was, in a sense, but I was out of the office many times, you know, so that it was run in my absence by competent personnel.

Q. Now, just tell me what the Detroit Steel Division terminal was, what went on there?

A. You want to know how a steel terminal operated?

Q. Just briefly what was done there.

[7] A. Well, in essence, it is an office and we have a drivers' room in the rear, we have a parking lot for the trucks, naturally we have communications between ourselves and the—by phone, to the various customers, which, in our division, were basically the steel mills in the area, although we are not confined to just hauling steel, we haul other articles, and our dispatchers would come in in the morning and, after they had been properly broken in, they would know how to bill, they would know how to make an inspection, they would know how to read a log, they would know how to get on the phone and tell the mills that we had various pieces of equipment and what directions they were going in. They would be able to take calls from the mill and then decide what type of truck would fit what type load, and then bill the truck out and send it on its way after it was properly inspected.

Q. Now, just very briefly, if a steel mill called and had a load of steel to be transported from Detroit to Kansas City,

and wanted a truck, and a trailer and a driver, you would furnish the equipment and driver; is that correct?

A. That's correct.

Q. And did Transamerican own power units?

A. Not in the Steel Division.

Q. How were your power units acquired?

A. The brokers, as we call them, they own the tractor and the [8] trailer, and then they are put under lease to us.

Q. Did you have any power units under lease for more than 30 days, at that time?

A. No—well, our lease is a self-perpetuating 30 day lease.

Q. I'm asking you that, as opposed to a single trip lease, you had long term leases and single trip leases?

A. It is a self-perpetuating 30 day lease which can be broken by either party within a 30 day period.

Q. Did you have drivers that were employed by Transamerican?

A. Did I have drivers?

Q. Yes. Were drivers employed by Transamerican to make these trips? I'm not referring specifically to this particular trip.

A. We have a peculiar situation. We have owner-operators. They own and operate their own equipment. In some cases, the owner will not drive it but we will get an operator to drive it who will then pass our tests in order to drive.

Q. Were those drivers that you referred to, were they employees in any cases of Transamerican?

A. Were the drivers employees?

Q. Right.

A. Well, they were issued a paycheck by Transamerican.

Q. Were withholding taxes withheld from their paychecks?

A. Yes.

Q. Was Social Security paid on behalf of them?
[9] A. Yes.

Q. Was—did they fill out any application, any employment application?

A. Yes, there had to be an employment application before—if they were a permanent leased operator.

Q. Did Transamerican give these persons, these drivers, directions where to go and pick up steel or other commodities and where to take it?

A. Yes.

Q. In addition to the owner-operated units, did you have any units that you operated under a single trip lease?

A. Yes, we did single trip lease.

Q. Is there a distinction between the owner-operated units under a self-perpetuating lease and a single trip lease?

A. We cut a certain type lease for them which they sign.

Q. In operation, there is a difference between a single trip lease and the self-perpetuating lease or permanent lease?

A. Yes.

Q. Can you tell us very briefly what the difference is?

A. Well, the permanent lease—I will put it this way, the single trip lease is only good for the length of the trip.

Q. All right.

A. It is signed off at the end of the trip when the man brings all his papers in. At that time the lease is terminated.

Q. Would the single trip lease be made with a broker or with **[10]** whom might it be made?

A. Well, it would be made with the driver.

Q. Directly with the driver?

A. You bring the driver in and he has the necessary documents, and if he passes muster, then he is single trip leased.

Q. What are the necessary documents?

A. Well, basically, you have to have a chauffeur's license, you have to have a physical, and you have to produce logs and——

Q. Logs showing what?

A. Showing what—we ask them for a seven day log period. They have to show us what they did in the last seven days.

Q. What is the purpose of that?

A. So that we don't come up with a back-to-back trip lease, which is illegal.

Q. A back-to-back trip lease would mean a—two trip leases running in a row on the same——

A. But you can do this if you are going in the same direction he is moving.

Q. Without getting into the details, that is the purpose of it, to avoid any legal violation; is that right? You want his logs to show——

A. Yes.

Q. I understand. To show that it is not a back-to-back trip lease?

A. That's right, or anything. We check on there. If it is so, **[11]** then we don't use it.

Q. In addition to the chauffeur's license, the logs, I think—or report in lieu of logs; is that correct?

A. Yes, and a physical.

Q. Anything else?

A. Yes. We have him produce the registration for the tractor and trailer.

Q. What is the registration?

A. Well, whatever state it is registered in, whatever state that the equipment is registered in. In other words, if he is plated in Ohio, he will have an Ohio registration.

Q. That is a document of some kind?

A. We take a picture of it. We want to prove that he has power of attorney to run this equipment.

Q. Does the registration show that he has some type of power of attorney?

A. If he has the registration, then we feel that he has the right to move the equipment.

Q. You mean to lease the equipment out?

A. Right.

Q. Did you require, in January, 1968, any written authority from the owner or the lessee of the—or the lessor of the truck?

A. No.

Q. You took the word of the driver and the documents that you **[12]** have described?

A. Right.

Q. As the basis for making a trip lease?

A. Right.

Q. Now, did you—were you familiar with the—with truck brokers or power unit brokers by the name of Mawby, M-a-w-b-y?

A. No.

Q. Have you ever heard that name?

A. After this incident occurred.

Q. After January 22, 1968?

A. That's right.

Q. Do you know whether or not prior to January 22, 1968 Transamerican ever leased any trucks belonging to May Mawby or Earl Mawby?

A. Not to my knowledge.

Q. Have you or has someone on your behalf checked the records of Transamerican to determine if there are any records showing leases of Mawby equipment prior to January 22, 1968?

A. Well, we have——

Mr. Voorhees: Let me interject here, I don't know that he has checked them but the records have been checked.

Q. (By Mr. Leritz) At least you have been informed that they have been checked?

A. Yes.

[13] Q. You have been informed that they had been checked, that the records have been checked?

A. Yes.

Q. And that there are no records of equipment leased from—that were owned by the Mawbys prior to January 22, 1968?

A. Yes.

Q. Now, can you give me some idea what percentage of your trucks were operated on trip leases, what percentage of your runs were trip lease runs?

A. No.

Q. Was it as much as 50 percent?

A. We wouldn't be that high, no.

Q. Something less than 50 percent?

A. Way less than 50 percent.

Q. I think you might have answered this, you didn't—Transamerican didn't own any power units, itself?

A. In the General Commodities Division, yes, but not in the Steel or Perishable Divisions which I operate out of.

Q. Now, did Transamerican have operating authority conferred upon it by the Interstate Commerce Commission?

A. In what respect?

Q. Well, did the Interstate Commerce Commission——

A. Well, basically——

Mr. Voorhees: I'm not sure that this witness is qualified to answer that. If he knows, certainly, go ahead and answer the question.

[14] A. I don't know whether they had it conferred. I do know that from time to time Transamerican will buy an authority of another truck line and then we'll go before the I.C.C. and we operate it temporarily until we are shown that we can operate it permanently, and then we are given permanent authority. This is no different than any other truck lines in the U.S.: that's how we grow.

Q. (By Mr. Leritz) Having been in the truck business for 17 years or more, can you tell me whether or not it is a requirement of Federal law or regulation that before a trucking line can operate in interstate commerce it must have some type of authority or permission from the I.C.C.?

A. Yes. You can't just start a truck line up. You must have authority, as you put it.

Q. You must have authority. Now, under the I.C.C. regulations, can a truck line operate anywhere in the country or is it limited to certain routes?

A. All right. Within our confines, we are confined to a certain operating area, the highways are defined and also where we can pick up and deliver. However, any other truck line, if you want to start a truck line, and you own a factory, let's say, and you have a product that you are sending throughout the country, you don't have to have authority, you are allowed to ship your own—in other words, your own goods.

Q. Your own goods?

[15] A. Right. And also you are allowed to pick up your own goods for delivery to your plant, no matter where it is in the country. When you get into the authority, that is what I mean by—well, it is a situation that is——

Q. Was Transamerican, in January, 1968, a common carrier?

A. Yes.

Q. It did not ship its own goods?

A. No.

Q. As a matter of fact, as you described it, the Detroit Steel Division shipped steel of producers or suppliers from one point to the other?

A. That's right.

Q. Therefore, from what you have told me, it was required that Transamerican have operating authority from the Interstate Commerce Commission to go to certain points throughout the country?

A. Right.

Q. And did it have authority to go from Detroit to Kansas City?

A. Yes, we do.

Q. In 1968, January?

A. Yes, we do.

Q. Was that authority limited to certain routes, or could you take any route from Detroit to Kansas City?

A. I don't know on that for sure now. I do not know that we had **[16]** the major highways and I couldn't see any reason why anybody would get off the major highways when you are going in a direct line.

Q. Are you aware or do you know whether or not a truck line, Transamerican, in, for example, its operating authority across the state of Illinois, has certain routes on which it must operate or can it operate on any route, do you know?

A. I'm going to say I'm not familiar with Illinois, that much. I do not know there are designated routes, I will put it that way, but I have to have this in front of me because authorities are very, very complex.

Q. You are aware that truck lines do have designated routes?

A. That's correct.

Q. Under I.C.C. regulations they are supposed to stay on those designated routes?

A. That's correct.

Q. Did I ask you if you had authority to transport steel from Detroit to Kansas City?

A. Yes, you did.

Q. And I think you said yes?

A. Yes, I did.

Q. Did you have a terminal in Kansas City in January, 1968?

A. Yes.

Q. Who was in charge of that terminal?

A. Frank Trotta, T-r-o-t-t-a.

[17] Q. Is he still in charge of that terminal?

A. He is at present in charge of our General Commodities Division in Kansas City. He is still there.

Q. Now, when a truck came in on trip lease basis, I want to get the mechanics of this, I'm not trying to pin you down now to this particular instance, how would you normally get a truck on a trip lease basis, would a truck just show up at your door or would you know where to go when you needed one?

A. Sometimes they would show up at the door but basically we would know where to go.

Q. Where might you go?

A. We might, for instance, call Brada Miller and ask them if they had any extra equipment that they wanted to trip lease to us.

Q. Prior to January, 1968, did Transamerican have occasion to trip lease equipment that was either owned or leased to Brada Miller?

A. Yes.

Q. Did you, yourself, participate in any dealings with Brada Miller prior to January, 1968?

A. I possibly did, but to pinpoint them, I can't.

Q. Do you have any specific recollection that you dealt with Brada Miller in trip leasing their equipment prior to January, 1968?

Mr. Voorhees: You mean by, **[18]** specifically, you mean as to a person, a date, an instance?

Q. (By Mr. Leritz) No, I mean that you actually know you did.

A. I would say yes because I recall like getting a call—now, whether we used the man or not, I don't know, but he would say, do you have any extra freight, which is the way you start operating a trip lease.

Q. Who would?

A. The driver.

Q. The driver, himself?

A. He would call and say do you have any extra freight. Under the normal way of answering, we would say, well, where do you want to go? They would say, so and so. Who are you with? Brada Miller. Where are you at? We don't know but perhaps we may later. If you can get released, we'll use you.

Q. Do you have any recollections that you ever had any conversations or conferences with anybody at Brada Miller's office with regard to trip leases prior to January, 1968?

A. No.

Q. The dealings would have been with the drivers, themselves?

A. Mine were, yes.

Q. Yours were?

A. Right.

Q. Do you have any information, as opposed to personal knowledge, any information that anybody with your company had any **[186]** dealings with the people at the Brada Miller office prior to January, 1968, with regard to trip leasing?

A. You mean I would specifically have to state that they did call at a certain time?

Q. Just information. Is it your understanding or information that——

A. It is my understanding that previous to this, that they had called Brada Miller for extra equipment.

Q. You are talking about Brada Miller's office?
A. And we call other lines too.

Q. But you don't have any personal knowledge of this?
A. No. In fact, I never called Brada Miller.

Q. Who would be the person, prior to January, 1968, who would have called Brada Miller if such were the fact?
A. The dispatchers or the office manager.

Q. Who was the office manager?
A. Frank Wiley.

Q. Is Mr. Frank Wiley still with the company?
A. No, he isn't.

Q. Do you know where he is now?
A. Yes, he is in Kenosha, Wisconsin operating—or has a franchise, Baskin Robbins ice cream store.

Q. You don't know his address?
A. No.

Q. How about Mr. Emery, who was he?
[20] A. He was our night dispatcher.

Q. And Wiley was——
A. ——the office manager.

Q. Are there any other persons who you believe may have had direct contact with the Brada Miller office prior to January, 1968, with regard to trip leasing?
A. I would have to go in the personnel files and see who I had at that time.

Q. Is there anybody whose name you can recall who is still with your company?
A. Well, it is possible that Kenneth Rariden, who, at present, is our perishable manager here in Detroit, he was my dispatcher here at the time.

Q. What is his name?
A. Kenneth R-a-r-i-d-e-n.

Q. Have you ever seen any correspondence between Brada Miller and Transamerican prior to January, 1968, with regard to trip leasing?
A. Not until July of '68 when they sent us the letter that they didn't want us using their equipment.

Q. That was the first time that you——
A. The first time, to my knowledge, that we had any correspondence with Brada Miller.

Q. And—when you took a truck in on a trip lease, for a single trip, were there certain requirements that you were obliged **[21]** to fulfill before you could use that truck, certain things that you were required to do, such as inspection, etc.?
A. Yes.

Q. Just tell me what those things were.
A. Well, we made a physical inspection of the truck.

Q. That was required by the Interstate Commerce Commission regulations or do you know?
A. No. We did that, ourselves.

Q. Were you familiar——
A. ——but the I.C.C. said that we must perform this type service, however, they didn't say we had to perform it each trip. But we did this for the safety of the motoring public and the driver and so on.

Q. Were you generally familiar with the I.C.C. regulations regarding lease and interchange of vehicles?
A. Lease and interchange?

Q. Yes, were you generally familiar with those regulations?
A. Well, in a general way, yes.

Q. Does that Section 1057 have any meaning to you?
A. Not a thing.

Q. Who would have been the person responsible for seeing that Transamerican complied with the various I.C.C. regulations at that time?
A. That would be Mr. DeLong's department.

Q. Is he still with the company?
[22] A. Yes.

Q. What is his first name?
A. Nelson.

Q. Nelson?
A. DeLong, yes.

Q. What was his position with the company?
A. Well, he was the head of our safety and compliance department.

Q. I presume that the people responsible for actually taking the trucks in under a trip lease and dispatching them out had been made aware of the I.C.C. regulations to the extent necessary to see that the trucks complied with them?
A. Yes, yes.

Q. And you mentioned an inspection that was made to comply with the I.C.C. regulations?
A. Yes, we have a copy of it.

Q. Were there any other regulations that come to mind—I'm sorry, were there any other things that come to mind that had to be done?
A. Well, the documentary evidence that I spoke of earlier.

Q. That is from the driver, himself?
A. Yes.

Q. Anything else that comes to mind?
A. Not offhand, no.

Q. Was it required, if you know, that any identification be [23] put on the truck showing that the truck was a Transamerican truck?
A. That's true, we placard the truck.

Q. What did you do now?
A. Placard.

Q. P-l-a-c-a-r-d?
A. Yes.
A. A placard has a list on the side—you have probably noticed it on a truck—where it lists states and numbers as our operating authority through these states.

Q. Does the—what is the placard made out of?
A. Well, I would say a heavy cardboard. Could be plastic, depending upon the company who is using them, you know.

Q. You mean the company that is using them, like Transamerican, in this instance?
A. Right.

Q. Are they temporary, to be affixed temporarily?
A. Yes, only for the length of the trip. When a man completes the trip, they are handed back into the terminal that he goes into.

Q. So if a man were driving a trip lease, a single trip from Detroit to Kansas City, the truck would be placarded in Detroit and he would turn the placard in at Kansas City, that terminal?
[24] A. Right.

Q. Did the placards have a serial number on them or are they in series?
A. Yes, they are. They have a number on them.

Q. Do you know offhand what some of your numbers were —well, strike that. I'm going to ask, how are those numbers obtained?

A. I don't know how they are obtained. I know they are on the placard is all.

Q. Are they issued by the I.C.C., or under any regulations of the I.C.C.?

A. No. I think it is for our own identification, really.

Q. Are they in series?

A. I would say yes in the sense that if you—we have a five digit number, they would run in series, you know, and there are two placards to a set.

Q. One for each side?

A. Right.

Q. Are they put on the door in the normal manner?

A. They are taped on the door. We use masking tape and tape them on the door.

Q. They would most likely then cover up any painting or lettering that would be on the door; is that correct?

A. It wouldn't cover it all, though. That is not necessary to do.

Q. Getting back to the numbers, are the numbers just internal **[25]** numbers used by your company, or do you know?

A. I don't know. I believe so.

Q. But it could be that they are issued by some operating authority?

A. As far as I know, I don't believe so.

Q. What else does the placard have on there?

A. Has our name.

Q. Which is Transamerican?

A. Transamerican Freight Lines, Inc.

Q. Anything else?

A. Other than the, like I mentioned before, there is nothing else.

Q. You mentioned something?

A. I said the states and numbers, the operating authority number that I.C.C. issued to us.

Q. I see. The operating authority number?

A. Right.

Q. Is that one single number?

A. Well, what do you mean by one single? Like one, two or——

Q. No. Did Transamerican in 1968 have a single operating——

A. No, each state shows an operating number.

Q. Each state shows an operating authority number?

A. That is on the placard. I should get a placard and show you.

Q. Can you do that?

A. Sure.

[26] (Short recess.)

Q. (By Mr. Leritz) Mr. Temperley, you have obtained a placard at my request, have you not?

A. Yes, I have.

Q. Will you read the top couple lines of the placard?

A. "Operated by Transamerican Freight Lines, Inc., Detroit, Michigan."

Q. Under Detroit, Michigan, what does it—is there a number?

A. I.C.C.-MC10761.

Q. Is that I.C.C.-MC10761, is that a number that has been assigned to Transamerican Freight Lines, Inc.?

A. Yes.

Q. By the I.C.C.?
A. I would assume so because I.C.C. is the I.C.C.

Q. Do you know what that number indicates?
A. No, I don't.

Q. Is that number on all your placards?
A. Yes, it is.

Q. Now, your placards, I notice, are about two and a half feet long and 18 inches or so, maybe two feet wide?
A. Give or take.

Q. And they are made of plastic or paper?
A. Or paper, right.

Q. In addition, the placards have a list of several states with numbers behind them?
[27] A. Right.

Q. Now, on the righthand side of one placard there is a number 7554. Is that an official number of any kind?
A. No, that was a company number.

Q. Are you aware that the I.C.C. regulations required such a placard while a truck was in operation?
A. Yes.

Q. Under your authority?
A. Yes, a trip lease truck has to have this; our own trucks are usually lettered or decaled.

Q. With the same type of——
A. No, this is a trip lease deal and every company has their own trip lease placards.

Q. If a truck is under a permanent lease, what type of placard would it have?
A. Normally, they decal those or, if the men want to, they can get a sign painted and paint all this on.

Q. But it does have this same——
A. Exactly the same.

Q. That is on the placard?
A. Yes.

Q. Okay. Now, do you know whether or not that is put on —strike that.

When a trip lease truck is being operated from—under your authority with a placard like **[28]** that on it, do you know whether or not that trip is being operated—strike that. I will get back to that later. Strike that entire question.

Now, getting back to this accident of January 22, 1968, I understand that the man operating the truck was named Howard L. Hardrick? You are familiar with that fact, are you not? You have become familiar with it?
A. I've become familiar with it, yes.

Q. Do you know Mr. Hardrick?
A. No.

Q. You have never met him?
A. No.

Q. Did the name mean anything to you prior to January 22, 1968?
A. No.

Q. Did the name Mawby mean anything to you prior to January 22, 1968?
A. No.

Q. Were you aware, prior to the fact of this trip, that this trip was to be taken?
A. No.

Q. Do you know who Mr. Hardrick reported to and who assigned the trip to him?
A. I would say Mr. Wiley. Are you talking Transamerican?

Q. Right.
A. I would say Mr. Wiley.

[29] Q. We have some documents that have Mr. Emery's name on them?

A. Yes.

Q. I think you testified that Mr. Emery was the night dispatcher?

A. Yes.

Q. Did he work in conjunction with Mr. Wiley or at a different time?

A. No, no, they overlapped. In other words, I think Mr. Emery came in around noon and worked til 8:00 o'clock at night. Mr. Wiley came in at 8:00 o'clock in the morning and worked til 5:00 in the evening.

Q. Did Mr. Wiley have authority to sign trip leases on behalf of Transamerican?

A. Yes.

Q. Did Mr. Emery have authority to sign trip leases on behalf of Transamerican?

A. Yes.

(Temperley Deposition Exhibit 1 marked for identification.)

Q. (By Mr. Leritz) Mr. Temperley, I'm going to hand you what has been marked Temperley Deposition Exhibit 1 and ask you if you can identify that document?

A. Yes, I can.

Q. What is that, sir?

A. That is the trip lease agreement form for—that we cut with authorized carriers.

[30] Q. Can you identify that particular lease? Have you ever seen it before?

A. This particular lease here, have I seen it before?

Q. Right.

A. You mean the lease form or——

Q. As it is filled out.

A. As this is filled out?

Q. Right.

A. I saw it after, I believe, for a brief perusal of it, after the——

Q. You have seen it, in any event?

A. I probably have glanced at it, yes.

Q. Now, it is executed on behalf of Transamerican by whom?

A. Bruce Emery.

Q. It is signed by Bruce Emery?

A. Yes, it is.

Q. Do you recognize his signature?

A. Yes, I do.

Q. Can you tell us where Mr. Emery is now?

A. No, I can't.

Q. Has he terminated his association with Transamerican?

A. He left, and I would have to look in the records to tell you the exact termination date.

Q. Give me the approximate date.

A. I can't.

[31] Q. Has it been within the past year or so?

A. Oh, no, this happened shortly after this. I mean, I would say that it had to happen—now, I will tell you why I'm putting this together, if you recall, we were discussing W-2 forms?

Q. Right.

A. And he said that we had to get the W-2 forms out by the end of January, you recall that this morning?

Q. Yes.

A. Then I have—or had at one time Mr. Emery's W-2 form so I would say on the basis of my getting that, that he

would have left our employ possibly the early part of February in '68.

Q. In '68?
A. Yes.

Q. Okay. You have no idea of his whereabouts?
A. He completely vanished.

Q. Did Mr. Emery have authority, on behalf of Transamerican, to execute that trip lease?
A. Yes, he did.

Q. Now, is the trip lease form that we are looking at, is that a form of trip lease that was ordinarily used by Transamerican Freight Lines, Inc.?
A. With an authorized carrier, yes.

Q. Was it prepared by Transamerican or someone on Transamerican's **[32]** behalf?
A. You mean the form, itself?

Q. Yes, sir.
A. That is a standard form with all companies and they are all the same, practically.

Q. Okay. Was it printed by Transamerican?
A. Yes, it would be printed by Transamerican. You notice Transamerican Freight Lines, Detroit, Michigan, on top, they print these forms, but the basic of this is that every company that has trip leasing has this form.

Q. At the time, in January, 1968, did you have any other forms that you used for trip leases with authorized carriers?
A. No, not authorized carriers; exempt carriers, yes.

Q. How many forms—I'm sorry, how many copies of the trip lease were made out for each trip?
A. You have me there, I don't know just exactly how many copies there are.

Q. More than one?
A. Yes, there are more than one.

Q. I notice this is marked number 2?
A. Yes. I could probably get you a trip lease form and then we could count the numbers and show you——

Q. Maybe we can do that later.
A. All right.

Q. Now, does this trip lease show the points between which **[33]** the trip was being made?
A. Yes.

Q. What are those points?
A. Detroit, Michigan, to Kansas City, Missouri.

Q. Was this trip being made between those two points under the operating authority of Transamerican?
A. Yes.

Q. Under the I.C.C. operating authority?
A. That's right.

Q. Okay. And you will note that there are two boxes on the right center of the lease?
A. Yes.

Q. One shows I.C.C.—I'm sorry, lessor's I.C.C. docket number?
A. Right.

Q. What is that number?
A. M.C. 29079.

Q. Do you know whose docket number that is?
A. That is Brada Miller's.

Q. Do you know the significance of that?
A. No, I don't.

Q. Do you know what a docket number is?
A. No, I can't explain a docket number.

Q. The other—what does that box show?
A. That shows our placard serial number.

[34] Q. Will you read that?
A. Transamerican placard serial number 9329 has been affixed to said vehicle.

Q. Now, does that indicate that the placards which we have been discussing—I'm sorry—does that refer to the placards that we have been discussing?
A. This refers to the placards that were issued to this truck at the time of the loading.

Q. And that is that cloth or plastic or paper placard that is affixed to the side of the truck?
A. Yes.

Q. And shows that it is operated by Transamerican Freight Lines, Inc.?
A. Yes.

Q. And is the number 9329, is that a number of a placard that belongs to Transamerican?
A. It is a set. There would be two placards numbered 9329.

Q. All right. Was each placard numbered in series?
A. I would say yes.

Q. Would there be any other placard numbered 9329?
A. Well, they come in sets, so there would be two of them.

Q. Aside from the set, any other set of placards 9329?
A. I don't think there would be.

Q. Okay. Do you have any reason to believe that the placard numbered 9329 was not, in fact, affixed to this truck for **[35]** this trip lease?
A. The placard is affixed at the terminal before the man goes to pick the load up.

Q. So there is no question, in this particular case, the placard was affixed?

A. When we sent him down for the inspection—before we sent him down for the inspection we had to put the placard on.

Q. Is any record of a trip, not involving an accident, a record of a trip, is there any record of that made and sent to the Interstate Commerce Commission?
A. No.

Q. In other words, there is no requirement that every time a trip is made, some type of record be sent to the I.C.C.?
A. No.

Q. Do you know whether or not the placard numbered 9329 was turned in by the driver at the Kansas City terminal?
A. No.

Q. Do you know where placard number 9329 is?
A. No.

Q. Do you know whether or not it is still in existence?
A. I would assume it is not in existence.

Q. But it could be used over again, could it not?
A. Yes.

Q. It wouldn't necessarily be destroyed after every trip?
A. No, not until it had outlived its usefulness.

[36] Q. Now, referring to the back of exhibit 1, Mr. Temperley, at the bottom I note it shows receipt for return of equipment to owner. Will you tell us what the significance of that is?

A. Well, when the time they signed the receipt, then that means that the equipment is no longer under trip lease to us.

Q. What is the date of that—does that show the return date?
A. It shows 24th of January, 1968, 1:00 P.M.

Q. And where was it?
A. Kansas City, Kansas, H. L. Hardrick, it looks like, I'm not sure.

Q. Do you have a terminal in Kansas City, Kansas?
A. Yes.

Q. Where is that located in Kansas City, Kansas?
A. I don't know. We would have to pull that out. I don't have the address.

Q. Do you also have a terminal in Kansas City, Missouri?
A. We have—in that area we would have, at that time, three terminals. We would have a perishable terminal, steel terminal and general commodities terminal. If any of them are in Kansas City, I'm not aware of it.

Q. At the time that this receipt was signed, the placard would have been turned over to Transamerican?
A. Yes.

Q. I also notice that the trip lease on the back contains a [37] vehicle inspection report which is not filled out.
A. Yes.

Q. Can you tell us why that was not filled out—I presume it is because of this one?

Mr. Voorhees: That's what I say.

Q. (By Mr. Leritz) I'm not trying to trick you, I just want to make the record clear.
A. No. We have our own form.

Mr. Leritz: Could you mark that, please?

(Temperley Deposition Exhibit 2 marked for identification.)

Q. (By Mr. Leritz) Mr. Temperley, I'm going to hand you what has been marked Temperley Deposition Exhibit 2. Can you tell us what that is?
A. That is a driver compliance and vehicle condition report.

Q. What is the significance of that?
A. To see that there are no major defects with the equipment.

Q. Is that made out on every trip leased truck?
A. Yes.

Q. Can you tell, from looking at it, whether or not it refers to the trip lease, Exhibit Number 1?
A. Yes.

Q. Is Exhibit 2 signed on behalf of Transamerican?
A. Yes.

[38] Q. By whom was it signed?
A. I signed this.

Q. Do you recall signing that?
A. Not offhand. I sign these because I'm certifying that the person who makes the inspection is qualified. In other words, I went down to this particular gas station and made sure that their mechanics were qualified to perform this necessary operation, so that I would pre-sign these.

Q. You didn't go down for each examination?
A. No, I didn't.

Q. I notice Mr. Emery's name is also signed on the exhibit, Exhibit 2?
A. Right.

Q. As what?
A. He is certifying that the outbound inspection was made.

Q. I see. Is it necessary that this form, or a similar form, be filed with the I.C.C., with respect to each separate trip?
A. This has to be on file when the I.C.C. comes in to examine our trip records, this must be part of the exhibit.

Q. It is not necessarily sent in to the I.C.C.?
A. No, it isn't.

Q. With regard to Exhibit 1, the trip lease, itself, is a trip lease of that kind sent in to the I.C.C.?
A. No, it isn't.

[39] Q. Is that also on file for examination by the I.C.C.?

A. Yes.

Q. Under what circumstances or why would the I.C.C. examine these records?

A. To see that we are in compliance with the regulations.

Q. Are all such exhibits examined, or only certain ones or how does it work?

A. I don't know how—I'm not in the I.C.C., I don't know just how—I know they do come in, I have been present, but we just turn the records over to them. Whether they check them all individually, or whether they spot-check them, we just let them go and we are available for answering questions.

Q. How long are they kept, normally?

A. I believe there is a certificate of destruction and we are allowed to destroy them after a given number of years, I would say about five years.

Q. When a driver operates one of your trucks on a trip for you, he is required to make out driver's logs, is he not?

A. Yes.

Q. Can you tell us what a driver's log is?

A. Oh, yes. It is a record of his driving, how long he has been on the road, and he is only allowed to drive ten hours in a 24 hour period, then he must take an eight hour break.

Q. Are these logs prepared pursuant to some I.C.C. regulation?

A. Yes.

[40] Q. Are they kept for a period of time?

A. Yes. They are kept with the—in the safety and compliance department here with the other records that are necessary for the trip.

Q. Do you have a separate file on each trip? Do you keep a separate file on each trip?

A. We have our own file, yes, of each trip, and we send certain paper work and I imagine they have a——

Q. What is "over here"?

A. The main office in Detroit. We send certain paper work over here and it is all compiled together. In other words, when it comes over here, part of it will come to the safety and compliance department, and part will go to the payroll department. I'm sure each department has a way of filing things as we, at the terminal level, have a way of filing ours. If you ask me, at the terminal, to pull a certain trip number, to look at, I could go to the files and pull this and hand it to you.

Q. Now,—do you want to mark these.

(Temperley Deposition Exhibits 3 through 7 marked for identification.)

Q. (By Mr. Leritz) I'm going to hand you what has been marked Exhibit 3, Mr. Temperley, and ask you if you can tell us what that is?

A. It is a statement in lieu of logs.

[41] Q. What is a statement in lieu of logs?

A. It shows the number of hours that the man worked previous to coming into a trip lease agreement with us.

Q. Is that form a form required by your company before it will enter a trip lease with the driver?

A. Yes.

Q. And is there a signature on that?

A. Yes, there are two signatures on here.

Q. Whose are they?

A. Bruce Emery and H. L. Hardrick, the driver.

Q. You can identify Bruce Emery's signature?

A. Yes.

Q. Okay. And let me see it, please. Was this document, Exhibit 3, received by your company from Hardwick at the time this trip lease was executed?

A. This was received from Hardrick prior to his going to pick up the load, yes.

Q. Okay. What is the date of it? Does it have a date?

A. 1-18-68.

Q. Now, I'm going to hand you exhibits——

A. Wait a minute, there are two dates on that. There is a date up here, 1-29-68 and 1-18-68.

Q. I'm going to hand you exhibits which have been marked 4, 5 and 6. These appear to be photostats. Can you tell us what they are?

[42] A. They are the driver's daily log.

Q. How many of them are there, all together?

A. There are six of them here.

Q. Can you tell us the dates shown on them?

A. 1-19-68 through 1-24-68.

Q. Are those copies of the logs required by the I.C.C.?

A. Yes, they are.

Q. By whom are they signed?

A. The driver.

Q. Mr. Hardrick?

A. Yes.

Q. Do they show the name of the carrier?

A. Yes, they show Transamerican on here.

Q. In each instance?

A. Yes.

Q. Were these driver's daily logs received by Transamerican with respect to this trip lease that we have been discussing?

A. Yes.

Q. When would Transamerican have received them?

A. Well, they received—let me see here. These were received after the trip.

Q. Where would the driver be required to turn those in?

A. Kansas City.

Q. Did he turn them in there?

A. I would say yes, he did turn them in there, but there is **[43]** no identification in here that says he did.

Q. Are those kept as part of your records, under the I.C.C. regulations? A. Yes.

Q. They are kept with the trip lease and the inspection report?

A. In the safety and compliance department.

Q. In other words, those records are subject to inspection by the I.C.C.?

A. Yes.

Q. Now, I hand you what has been marked Temperley Deposition Exhibit 7. Can you tell us what that is?

A. It is a driver's log.

Q. Is that a copy or an original?

A. I have no way of knowing.

Q. Well, is it on an original form?

A. It is on an original form, yes.

Q. And was that received by Transamerican?

A. I would say it is in our possession, therefore we received it somewhere along the line.

Q. What is the date of it?

A. 1-22-68.

Q. Who would there—who, in your company, would be able to identify that, if anyone?

A. In what way?

Q. Stating that it was received by your company from Hardrick?

[44] A. Well, I would say that Frank Trotta at Kansas City, he, or one of his assistants.

Q. Now would, in the normal course of business or operations, how would these logs come to Detroit from Kansas City?

A. They would be mailed in.

Q. By Trotta?

A. Yes. Each terminal mails these at the end of the day.

Q. And then, of course, you would keep them as part of your file?

A. Kept here in Detroit, yes.

Q. I want to call you attention to the log dated 1-22-68, being part of Exhibit 4 and 5. I would like you to compare it with Exhibit 7. Do they both have the same date?

A. Yes, they do.

Q. Do they both purport to be for the same day and trip?

A. Yes.

Q. Are they different logs?

A. Yes.

Q. Can you explain why that is so?

A. I would say that probably he was told to make copies of his trip. We probably need extra copies, and he had written on this one, and we don't need this on here, all we need is this, at the scene of accident, and we are making accident reports for the I.C.C. anyways, so I imagine that was the reason. I'm not positive but I would believe that would, **[45]** believe that would be the reason.

Q. Can you tell me whether or not, from the fact that this Exhibit 7 is on an original form, whether or not that was made here in the Detroit area or at your Detroit terminal?

A. There is no way for me to tell you where this was made.

Q. It might have been made in Kansas City or it might have been made here?

A. Or made anywhere.

Q. Would anyone, to your knowledge, know that?

A. Not to my knowledge, no.

Q. Do you know at whose request Exhibit 7 was filled out?

A. Could have been anyone.

Mr. Voorhees: I assume Hardrick would know that.

A. He would know who had to make out the extra copies.

Q. (By Mr. Leritz) I was wondering if you were aware that anyone with your company knew?

A. No. As I say, when you are making out accident reports, sometime you have to get everything you can so it is not uncommon to duplicate.

Q. Now, I'm going to hand you a—I'm sorry—I think I will have two more exhibits marked.

(Temperley Deposition Exhibits 8 and 9 marked for identification.)

Q. (By Mr. Leritz) I'm going to hand you what has been marked **[46]** Exhibit 8 and ask you if you could identify it?

A. Yes, that is a telephone report of an accident.

Q. Is it part of the records of Transamerican Freight Lines, Inc.?

A. Yes.

Q. Can you tell us where it was received—sorry, can you tell us from whom it was received?

A. From Howard Hardrick.

Q. Do you know who prepared that form?

A. No—E. Swain, it says on the form.

Q. Is E. Swain an employee of Transamerican?

A. I don't know who E. Swain is.

Q. Are you aware of any requirement of the I.C.C. that accidents involving motor carriers must be reported to that Commission?

A. Yes, they must be reported.

Q. Is there a certain form that is required?

A. Yes.

Q. Do you know the form number offhand?

A. No, I don't.

Q. I'm going to hand you what has been marked Temperley Exhibit 9 and ask you if you can identify that.

A. Yes, it is a motor carrier accident report.

Q. What is the form number shown on there?

A. Form M.C.S. 501955.

Q. Was that form completed by—who was that form completed **[47]** by?

A. J. Dwight Nash.

Q. J. Dwight Nash at that time was an employee of Transamerican?

A. Yes.

Q. As part of his—what were his duties at that time?

A. Mr. Nash was director of compliance.

Q. Compliance with——

A. ——Transamerican Freight Lines.

Q. With I.C.C. regulations?

A. Yes, he would deal with I.C.C. regulations and also would inspect our trucks.

Q. Did Mr. Nash complete that form pursuant to his duties as an employee of Transamerican?

A. Yes.

Q. And was that form or a copy or an original of that form filed with the I.C.C.?

A. Yes.

Q. What is the date of that form?

A. He shows 5-17-68.

Q. Do you know why the time lapse between January, 1968 and May, '68 for the filing of this?

A. I have no idea.

Q. All right. I think you did say a copy of this was sent to the I.C.C.?

A. Yes.

[48] Q. Mr. Temperley, can you tell me the significance of that tear-off sheet at the bottom of Exhibit 9?

A. Well, I—it is a receipt, it says here "it is acknowledge of your accident report."

Q. Do you know where it was supposed to be sent after it was torn off?

A. I would say this was made out in duplicate, and this is a copy, as you can see, and the original went to the I.C.C.

Q. Are you aware of any correspondence between your company and the I.C.C. regarding this accident on January 22, 1968?

A. No.

Q. Do you know whether or not a request was received from the I.C.C. for the completion of this form?

A. No.

Q. Did I ask you whether or not you received a medical report on this driver, Hardrick, before he started work with—started this trip lease?

A. Yes, we did.

Q. Do you have that?

A. No, but it is noted on the form. I don't have it.

Q. Do you know whether or not it is still in possession of the company?

A. We should have it somewhere, yes.

Q. Did you have anything to do with preparing a check dated January 24, 1968, to Brada Miller Freight System, Inc?

[49] A. I might have pre-signed that check. It is a two signature check, right?

Q. There is a Robert Woody and Frank Trotta?

A. Not that check. That check was prepared in Kansas City.

Q. You personally would have had nothing to do with the authorizing of it or preparing it?

A. No, not that particular check, no.

Q. It has been indicated in Answer to Interrogatories that your company issued numerous checks—not numerous—issued certain or some checks payable to Brada Miller prior to January 22, 1968 for trip leases?

A. That's right.

Q. Have you ever seen any of those checks?

A. Yes, I would have seen them. But, to specifically say this one was issued on June 9, 1962, I could say no. I would see them in the normal course of a working day.

Q. In the normal course of business, would those checks be sent to the Brada Miller office or would they be given to the driver?

A. They were at that time given to the driver.

Q. Do you know where those checks are now, the originals?

A. No, I don't know where they are.

Q. Are they in possession of your company?

A. As far as I know, they are in the possession of our company, yes.

[50] Q. What bank were those checks written through?

A. Manufacturer's Bank.

Q. Where is that located?

A. In Detroit.

Q. Do you——

Mr. Voorhees: The Manufacturer's National Bank of Detroit.

Q. (By Mr. Leritz) Does your company have any records showing the numbers of those checks or the dates of those checks?

A. I would say yes.

Q. Do you know the nature of those records?

A. No.

Q. Are they here in Detroit?

A. I don't have anything to do with records except at the terminals, we would have a copy of the stub, and a copy of the check, if they hadn't been destroyed in the normal course of events.

Q. Do you know whether or not the stubs are still available?

A. We would have to go to the terminals and find out.

Q. They would actually be kept at the terminal?

A. That's right.

Q. In this particular case, Melvindale, Michigan?

A. We would have a copy of the check, itself, at the terminal.

Q. A photocopy or a——

A. No, no.

[51] Q. A carbon copy?

A. A carbon copy that would be kept at the terminal.

Q. It won't show an endorsement, of course?

A. No, but it would be showing who it was made out to.

Q. Without marking as an exhibit—marking these as exhibits, Mr. Temperley, I'm holding here a document which has been described to me as a Scrip or Trip Record or Pay Scrip.

Can you tell me whether or not you have such a record for the trip involving Howard Hardrick out of which this incident arose?

A. We do, yes, Transamerican has a copy.

Mr. Leritz: Do you have that?

Mr. Voorhees: Yes.

Mr. Leritz: Can I take a look at it now before I finish up with Mr. Temperley?

Mr. Voorhees: I think——

(Short recess.)

(Temperley Exhibits 10 through 14 marked for identification.)

Q. (By Mr. Leritz) I'm going to hand you Temperley Exhibit 10 and ask you if you can tell us what that is?

A. That is a Trip Record.

Q. What is a Trip Record?

A. It is the necessary information to—well, that the man carries in his possession in order to effect payment when he **[52]** delivers his load.

Q. Now, you have, in hand, what appears to be a carbon copy, do you not?

A. Yes.

Q. Can we take a look at it?

A. It is copy number 3.

Q. Do you know how many copies of this form there would be?

A. I think there are five copies all together.

Q. Where is the original?

A. The original is sent to the payroll department.

Q. Here at this address that we are at right now?

A. Yes.

Q. So the original would be here; is that correct?

A. Yes.

Q. Okay. Now, this is copy number 3. What is done with copy number 3?

A. The driver takes this with him, there are a couple other copies too, and one is the driver copy and one is the owner copy. This is completed on the other end. He is then paid at that time.

Q. Where is this form, Exhibit 10, filled out?

A. It is partially filled out at the origin terminal and completed at the destination terminal.

Q. In this particular case, this shows the name to be Howard L. Hardrick, does it not?

[53] A. Yes.

Q. Was this form, Exhibit 10, filled out here in Detroit or at Melvindale?

A. Melvindale.

Q. At Melvindale, Michigan—at the time that this trip started?

A. I would have to look at the bill, the freight bill copies.

Q. Let me ask you a few more questions about this then.

A. I was going to tell you why.

Q. Let me ask you a few more questions about this.

In any event, the driver carries this copy with him to his destination?

A. This and a couple of others, yes.

Q. I know there is a signature down at the bottom, under the printed word approval, whose signature is that?

A. Frank Trotta, our terminal manager at Kansas City at this particular time.

Q. Is that his signature?

A. Yes.

Q. How did this particular copy get back into the hands of the Detroit office, was it mailed by Mr. Trotta?

A. Yes.

Q. I know at the top it shows the name, owner, and then it has, Brada Miller Freight System, Inc., May Mawby, down below, and then 17628 Colgate, Dearborn Heights, Michigan; is that **[54]** not correct?

A. Yes.

Q. Does it appear to you that there is a difference in typing between May Mawby and Brada Miller?

A. Yes.

Q. The typing of May Mawby is a carbon typing, is it not?

A. Yes.

Q. Does it not appear that the typing of the name Brada Miller is an original typing?

A. Yes.

Q. Do you know whether or not the name Brada Miller was added at sometime subsequent to when this was originally filled out?

A. This could have been a mistake on Emery's part. He actually hadn't learned all he knew and this could have been placed on there by the terminal that he went into. This is not an uncommon occurrence where—if these things are not completed correctly. Therefore, in order to get this on the complete copy, you would have to get the other copies that were sent to the main office. But they, at the other end, knew that this trip lease was coming in, it had to be with a trip lease carrier and it was showing on the trip lease form that Brada Miller was the authorized carrier trip leasing this, so I would assume that Frank Trotta or one of his people put this on.

[55] Q. All right. Do you know, was May Mawby an authorized carrier?

A. What?

Q. Is May Mawby—you refer to authorized carrier——

A. If she is, I don't know.

Q. You mentioned that Kansas City knew this trip was coming in. How would they know about that?

A. We have a teletype system.

Q. Do you have any records showing——

A. We wouldn't have those records, no.

Q. Where would those records be?

A. Well, our teletype sheets, we usually destroy those within, well—you hold them maybe a year and then throw them away. You have seen teletype paper, you roll reams of that.

Q. Do you have any copy of any written message to Kansas City with regard to the——

A. No——

Q. This—this trip?

A. We have a dispatcher, and each evening or the following morning, he would show as being enroute to Kansas City and as estimated time of arrival would be put on there.

Q. You don't have a copy of that?

A. No, sir.

Q. It has been destroyed?

A. Probably.

Q. Now, I note—what is the gross rental shown on this **[56]** Exhibit 10?

A. The gross rental is $420.00.

Q. I notice it shows total deductions of how much?

A. One hundred seventy-five dollars and then the check which was issued to Brada Miller of $225.25.

Q. What does total deductions mean?

A. That is the advances up here, what they have done, they had added these two together. He was issued a check, 054939 for $100, and 047154 for $75.00.

Q. Who was issued such a check?
A. The driver.

Q. How was the check made out?
A. In the name of the driver.

Q. Was that issued to him at the Melvindale terminal?
A. Yes, it was.

Q. Before he started?
A. Right.

Q. What was that for?

A. That is for fuel, that is for lodging, that is for food, that is in the event of a breakdown, that he has money that he can buy parts or have the necessary repairs made.

Q. Now, do you know whether or not this check for $225.25 was given to the driver at the Kansas City terminal?

A. I have no idea what they did with the check at the Kansas City terminal. I have seen a copy of the check. All I know, **[57]** it was made out to Brada Miller.

Q. Do you know what the usual procedure at the Kansas City terminal was?

A. I don't know.

Q. What is the usual procedure here?
A. Our procedure was to give the check to the driver.

Q. I notice under, on the lower righthand corner of the form it says, "instructions. Driver to follow certified routes only."
A. Right.

Q. Is that a common instruction to put on this type of form?
A. Yes, it is.

Q. Whose certified routes would they be?
A. Ours.

Q. Transamerican?
A. Right.

Q. Would the driver in the normal course of business be instructed as to what those routes were?

A. He would have a copy of our authority. He would know where they are.

Q. He wouldn't have, of course, a copy of your entire authority, he would be given just enough information to take him to his destination?

A. Correct.

Q. Do you have a form of that?
[58] A. Yes, we have forms.

Q. You have a form of that?
A. Yes.

Q. Do you have a form showing the instructions that were given to Mr. Hardrick in this case?

A. No, they would be verbal. He would be told that these are the routes that we take and he was to follow those routes.

Q. He would be given something written, would he not?

A. We have a regular, like you say—it is not a form, it shows the authority within the state.

Q. Would this form that Mr. Hardrick woud be given, would it take highway so and so to so and so and then highway so and so to so and so?

A. Yes.

Q. Do you have a copy of that?
A. No.

Q. Do you know if there is a copy of that in existence?
A. Yes, at each terminal.

Q. Where would it be located in the normal course of events?

A. They would have it in a file cabinet, when the proper time came up, such as a trip lease, they would produce the necessary documents so he would know which routes to run.

Q. I'm talking particularly with regard to the trip we have been discussing?

A. Yes.

[59] Q. Do you know where a copy of that completed form is?

A. You mean the form that he had? He would turn this in. We have a safety packet too that he carries and he would turn this in at the termination of his trip.

Q. Maybe I misunderstood. Is the form showing——

A. I will tell you what you are getting at.

Q. Yes.

A. There is no form. There is no such thing as take I-16 to I-19 to W-34, there is no such form as that.

Q. Explain it again to me then.

A. There is no such form as that.

Q. What does he receive?

A. He receives a copy of our authority within that state which clearly states what highways can be used.

Q. Does he turn that in?

A. At the end of the trip.

Q. At the end of the trip?

A. Right.

Q. He is required to follow that?

A. That is why we put that on there.

Q. Now, I hand you what has been marked Temperley Exhibits 11, 12 and 13 and ask you if you can tell me what those are?

A. Those are copies of the freight bills. One is the rate audit copy, one is the consignee memo and another freight audit copy, but—that is why I wanted to say this **[60]** previously.

Q. Explain it, if you will.

A. Because he went out on what we call the weight and charge billing.

Q. What does that mean?

A. That means that he was given all this material and that he was given this pick-up slip at the mill, after all the proper avenues had been covered, and he went to the mill and we were not able to, at this time, to cut the freight bill.

Q. What does that mean?

A. Well, we cut a revenue pro. This is a revenue pro, this pro here.

Q. Exhibit 11?

A. Yes, it is what we call a revenue pro.

Q. What is that short for?

A. Well, see here, this is what he ran with.

Q. Exhibit 13?

A. And the pro on that is 9327982. Now, upon completion of his trip, he also had this bill of lading.

Q. Where did he receive the bill of lading?

A. At the mill.

Q. That is Exhibit 14?

A. Right. When he arrived in Kansas City, they cancelled this bill, this was merely——

Q. This bill being Exhibit 13?

[61] A. Exhibit 13 was cancelled because it was not a revenue pro. This is normal procedure. Now, they, in turn, put in the proper—see, there was no way for us to know in Detroit how many bundles he had or approximately what weight—we show approximately 44,000. We see that he carried 44,250, so when you go to the mill, they approximate just about how much weight you are going to get, so you never know exactly. So he ran on this. Now, he can deliver on this——

Q. This, being Exhibit 13?

A. Yes. There was a copy that he leaves with the consignee but he, when he arrived at Black, Slaybaugh's and Bryson in

Kansas City, he would fill in the number of pieces and the correct weight.

Q. I see.

A. And then the customer would sign that he received such a thing. He would keep one copy and give one copy back to the driver. The driver, in turn, takes this copy back in to us, along with this bill of lading. From that we cut what we call a revenue pro to bill for our money, and we cancel the bill he ran on.

Q. Okay. Now, one or two more questions, you have indicated earlier that there was some question, some doubt in your mind that these truck drivers generally were employees of yours; is that correct, or did I misunderstand you?

[62] A. No, you never heard me state that.

Q. Some of the truck drivers were employees of Transamerican; is that correct?

A. Well, the permanent leased operators are our employees, yes.

Q. They are your employees?

A. Yes.

Q. Do you ever have a person who is not a permanent leased operator, just a simple truck driver, who would come in and get a job with you, without bringing equipment along?

A. No.

Mr. Voorhees: Is that true of all divisions?

A. We are speaking of this, aren't we?

Q. (By Mr. Leritz) What is this now?

A. We are discussing this particular case now.

A. We are discussing this particular case here, aren't we, I mean, in essence?

Mr. Voorhees: That question was not limited to the steel division.

A. I thought we were discussing this case here. I mean, again, there are many ramifications too.

Q. (By Mr. Leritz) We have been discussing the Detroit Steel Division?

A. Right.

Q. That was located or is located at 17516 Dix in Melvindale?

[63] A. Correct.

Q. Were any other divisions located there?

A. At one time the perishable division was located there.

Q. How about in January, 1968?

A. No, just the Detroit Steel Division.

Q. And Mr. Wiley was the office manager? A. Right.

Q. He was the office manager only for that division?

A. Right.

Q. Now, did truck drivers make application to Mr. Wiley for employment as drivers with your company?

A. Yes.

Q. Before you would accept a person as a driver for your company, must he bring with him equipment?

A. Yes.

Q. Would you ever accept a driver for your company who came in in a single trip lease, came in for a single trip lease, would he be an employee of your company?

A. No, he would be an employee of the company that he is working for. At no time would he be an employee of ours. We issue our check directly to the carrier that we are working with.

Mr. Leritz: I have one more exhibit. (Temperley Exhibit 15 marked for identification)

[64] Q. (By Mr. Leritz) I'm going to hand you what has been marked Temperley Exhibit 15, Mr. Temperley, and ask you if you can tell us what that form is?

A. Yes. That's a form that we have that, before we hire someone, we send to the company that he is presently working for, or has worked for, to get a reference on.

Q. Now, you will notice there is a signature on that form at the top, in the middle there?

A. Yes.

Q. Whose signature is that?

A. Frank Wiley.

Q. Do you recognize that signature?

A. Yes, I do.

Q. Did he sign that on behalf of Transamerican?

A. Yes, he did.

Q. And before Hardrick could be hired by your company, he would have to present himself with a unit that he was in a position to lease to your company on a permanent lease; is that correct?

A. Yes.

Q. There is no other way he could be hired by your company?

A. No other way he could be hired.

Mr. Leritz: I think that's all. Thank you.

Ronald Temperly—Exhibits

Exhibit 1 p. 29—trip lease with Brada Miller

2 p. 37—inspection report

3 p. 4—statment in lieu of logs

4 p. 41—Drivers logs 1-19 & 1-20

5 p. 41—Drivers logs 1-21 & 1-22

6 p. 41—Drivers logs 1-23 & 1-24

7 p. 43—Drivers logs 1-22-68

8 p. 46—telephone report of acc.

9 p. 46—ICC accident form

10 p. 51—trip record

11 p. 59—Rate audit copy

12 p. 60—consignee memo

13 p. 60—rate audit copy

14 p. 60—bill of lading

15 p. 64—employment application form

[illegible] AGREEMENT

IF COPY — ATTACH TO PAY COPY OF RECEIPT.

THIS AGREEMENT, made and entered into this 19 th. day of January A.D. 19 68, by and between TRANSAMERICAN FREIGHT LINES, INC., a Delaware Corporation, hereafter referred to as the First Party lessee, and Breda Miller Freight System, Inc. whose address is 3120 Leroyo Ave. of the City of Detroit, State of Michigan hereafter referred to as the Second Party, lessor.

WITNESSETH: WHEREAS, First and Second Parties are authorized carriers as that term is defined in the rules and regulations of the Interstate Commerce Commission pertaining to the lease and interchange of vehicles by motor carriers, and

WHEREAS, the Second Party is the owner or holds under a lease for more than thirty (30) days, certain motor vehicle equipment regularly used by it which it desires to lease to the First Party for its use as hereinafter specified.

NOW, THEREFORE, in consideration of the compensation to be paid by First Party to Second Party and the mutual promises, agreements and conditions herein contained, it is hereby agreed as follows:

1. The Second Party hereby leases to the First Party the following motor vehicle equipment to be operated by H.L. Hardrick (Driver's Name) (Soc. Sec. No.) a driver who is duly authorized by the Second Party to execute this Agreement on its behalf, for the movement in interstate commerce for the duration of one (1) single trip beginning at 1:00 P.M. on Jan. (Month) 19, (Day) 1968 (Year), of such freight which First Party shall turn over to Second Party and the Second Party agrees to transport such freight from the place or places where Second Party may receive the same in the City of Detroit, State of Michigan direct to without deviation from authorized routes of the First Party to its terminal in the City of Kansas City, City and State of Kansas Missouri which latter city Second Party represents is in the direction of a point which it is authorized to serve.

DESCRIPTION OF VEHICLES

Type of Equipment	No. of Axles	Make	Year	Engine No.	Serial No.	Weight	License Plates	
							State	Number
Tractor	3	Intl	1963	TD 218379		14220	Mich.	9929 CC
Trailer	2	Brown	1965	TCD 633		11790	Mich.	500-214

2. First Party agrees to pay Second Party and Second Party agrees to accept therefor the following compensation:

BASIS OF PAY FOR TRIP REPORT NUMBER 201 - 4164

RENTAL:

____ MILES AT ____ PER MILE
____ POUNDS AT ____ PER TON } $ ____
73 % OF $ Gross REVENUE
OTHER ____ $ ____
TOTAL $ ____

LESSOR'S I.C.C. DOCKET NO. MC29079

TRANSAMERICAN PLACARD SERIAL NUMBER 9329 HAS BEEN AFFIXED TO SAID VEHICLE

3. Second Party further agrees that it will bear the entire cost of operating said motor vehicle equipment, and that it will at all times keep said motor vehicle equipment in good mechanical condition, order and repair, and will cause said motor vehicle equipment to be operated only by a competent employee of the Second Party, on which event said employee of the Second Party shall be the sole agent, servant, employee or representative of the First Party. It is being expressly understood and agreed that nothing herein is to be construed as constituting Second Party, its agents, servants and employees, as the agent, servant, employee or representative of the First Party.

4. It is mutually understood and agreed, that the First Party during the term of this lease shall assume control and responsibility for the operation of said equipment in respect to the public, shippers and Interstate Commerce Commission for such period that said equipment is operated under the terms of this lease as provided in Paragraph 1 hereof.

5. Second Party further agrees that in the operation of said motor vehicle equipment it will comply with all the rules and regulations of the Bureau of Motor Carriers of the Interstate Commerce Commission, and the applicable rules and regulations of any public utility commission and of any other similar state authority, that it will observe all pertinent rules and regulations governing the hours of service of its drivers of helpers, and all regulations, laws and ordinances of any governmental authority applying to the operation upon the public highways of said motor vehicle equipment that it will pay any and all federal or state withholding taxes, assessments, unemployment insurance, old age benefits, or other social security payments that may be required to be paid by reason of the payment of wages or other earnings to the driver of said motor vehicle equipment, or to any helper, or to any person or persons engaged in the carrying out of this Agreement upon the part of Second Party and further agrees to meet all laws or regulations now or hereafter adopted or promulgated by legally constituted authorities in respect thereto.

6. It is mutually agreed that responsibility of First Party resulting from control and use of said equipment pursuant to Paragraph 4 shall in no way abrogate the rights of the First Party to demand set off and indemnity from the Second Party as set out in Paragraph 9 hereof.

7. It is further agreed that Second Party represents that its employee, agent or servant executing this agreement has full authority to act on its behalf and represents that said person is competent and qualified to perform the vehicle inspection required by the Interstate Commerce Commission regulations.

8. Second Party further agrees to procure and maintain at its own expense adequate fire, theft and collision insurance with respect to the aforesaid motor vehicle equipment and to indemnify and save the First Party harmless from any and all loss, damage or expense arising out of fire, theft, collision, accident or other casualty or event affecting such equipment. In the event the Second Party shall be damaged or lost because of the fault or negligence of the Second Party or the driver designated by said Second Party, the Second Party agrees to pay First Party for said loss or damage to said trailer. The Second Party further agrees to indemnify and to hold the First Party harmless from all loss and damage to property belonging to or leased by the First Party and from all losses and claims for damage to cargo that shall be occasioned or caused by the negligence or fault of the Second Party or the driver or operator of said equipment designated by the Second Party.

9. It is mutually understood and agreed by and between the parties hereto that First Party shall not be responsible to Second Party, its agents, servants and employees, for any negligence of the Second Party, its agents, servants or employees, or for any loss, damage, injury, or expense arising out of the failure of Second Party to carry out the terms of this Agreement. Second Party hereby agrees to indemnify and save harmless First Party from any and all claims, suits, losses, liens or other expenses arising out of, based upon or occurred because of claim by any person or persons for damage to property sustained or which may be alleged to have been sustained by reason of any negligence or alleged negligence on the part of Second Party, its agents, servants or employees, or for loss or damage to cargo resulting from any negligence or unlawful act of Second Party, his agents, servants and employees. It is mutually understood and agreed that Second Party will defend, at his own expense and cost, any and all suits that may be brought against First Party for injuries sustained, including death resulting therefrom, or damage to property caused or alleged to have been caused by any negligence of any person employed by Second Party while engaged in the performance of any of the work required by the terms and conditions of this Agreement, and for any cargo loss sustained resulting from any negligence or unlawful act on the part of Second Party, his agents, servants and employees. Nothing in this Paragraph 9 contained shall be construed to in anywise limit the liability of the Party of the First Part to the public in connection with the use of said equipment under this Agreement.

10. It is mutually understood and agreed that upon the termination of this Agreement, the Second Party will forthwith remove from said motor vehicle equipment all paints, signs or other evidence of certificate numbers of persons belonging to First Party, and deliver the same to said First Party, together with any other property of First Party that may be then in the possession of Second Party, including collections and C.O.D. charges.

11. First Party has caused an inspection to be made of the aforesaid motor vehicle equipment, the results of which have been certified upon the report attached to a copy of this lease, which discloses that the same is equipped with all parts and accessories necessary for its safe operation in accordance with the Safety Regulations of the Interstate Commerce Commission.

12. The First Party, by signing this Agreement acknowledges receipt of the motor vehicle equipment specifically described in Paragraph 1 above on the date and at the time therein set forth.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed in quadruplicate on the date set forth below.

Temperley Depo Ex I
W.R. 1-30-73.

Date Jan. 19, 1968

TRANSAMERICAN FREIGHT LINES, INC.

Location 17526 Dix Road, Melvindale, Michigan (Detroit, Michigan area)

Per B. Emery (First Party)

Breda Miller Freight System, Inc. (Owner of Motor Vehicle Equipment)

By [signature] (Authorized Agent) 233

Second Party

Form 481 - Rev. 11-67

VEHICLE INSPECTION REPORT

TRANSAMERICAN INTERIM CORPORATION — LESSOR'S INSPECTION

ITEM
1. REPORT OF VEHICLE INSPECTION
2. EVERY ITEM MUST BE CHECKED EITHER "NOT DEFECTIVE" OR "DEFECTIVE" WITH DESCRIPTION OF DEFECT

Tractor Color ____ Trailer Color ____

Van ☐ Low side ☐ Open Top ☐ Flat Bed ☐

TRACTOR OR TRAILER				TRACTOR OR TRAILER			
ITEM	NOT DEFECTIVE	DEFECTIVE	DESCRIPTION OF DEFECT	ITEM	NOT DEFECTIVE	DEFECTIVE	DESCRIPTION OF DEFECT
BODY				BODY			
BRAKES				BRAKES			
BREAKAWAY				BREAKAWAY			
LOW PRESSURE INDIC.				LOW PRESSURE INDIC.			
COOLING SYSTEM				COOLING SYSTEM			
DRIVE LINE				DRIVE LINE			
DIFFERENTIAL				DIFFERENTIAL			
FIRE EXT., 1-1-1/2 QT., FULL				FIRE EXT., 1-1-1/2 QT. FULL			
3-FLARES OR ELEC. LANTS. (RED)				3-FLARES OR ELEC. LANTS. (RED)			
3-FUSEES				3-FUSEES			
2-RED FLAGS, WITH STAND.				2-RED FLAGS, WITH STAND.			
SPARE LIGHT BULBS				SPARE LIGHT BULBS			
SPARE ELECTRIC FUSES				SPARE ELECTRIC FUSES			
TIRE CHAINS				TIRE CHAINS			
HAND TOOLS				HAND TOOLS			
ENGINE				ENGINE			
EXHAUST SYSTEM				EXHAUST SYSTEM			
FUEL SYSTEM (I.C.C.)				FUEL SYSTEM (I.C.C.)			
GLASS				GLASS			
HORN				HORN			
LICENSE PLATES				LICENSE PLATES			
PERMIT NOS.				PERMIT NOS.			
LIGHTS (STATE WHICH)				LIGHTS (STATE WHICH)			
REFLECTORS				REFLECTORS			
SPEEDOMETER				SPEEDOMETER			
SPRINGS				SPRINGS			
STEERING				STEERING			
TIRES				TIRES			
WHEELS				WHEELS			
WINDSHIELD WIPER				WINDSHIELD WIPER			
TURN SIGNALS				TURN SIGNALS			

ANY OTHER ITEMS REQUIRING ATTENTION

I hereby certify that on the ____ day of ____ 19____ I carefully inspected the equipment described above and that this is a true and correct report of the result of such inspection

(Signature of Person Making Inspection)

I hereby certify that on the date stated above the person who made the inspection covered by this report was competent and qualified to make such inspection and was duly authorized to make such inspection as a representative of TRANSAMERICAN FREIGHT LINES, INC.,

Date ____

(Signature Authorized Carrier or Officer of Authorized Carrier) (First Party)

ANY OTHER ITEMS REQUIRING ATTENTION

I hereby certify that on the ____ day of ____ 19____ I carefully inspected the equipment described above and that this is a true and correct report of the result of such inspection

(Signature of Person Making Inspection)

I hereby certify that on the date stated above the person who made the inspection covered by this report was competent and qualified to make such inspection and was duly authorized to make such inspection as a representative of

Date ____

(Signature Authorized Carrier or Officer of Authorized Carrier) (Second Party)

RECEIPT FOR RETURN OF EQUIPMENT TO OWNER

By completing the above inspection the Second Party hereto specifically acknowledges the return of such equipment to him on this 24 day of Jan. 1968 at ____ a.m. or p.m. at Kansas City, Kansas City State

Received by ____ (Vehicle Owner)

By H.L. Hardrick (Authorized Agent) 234

Form 482 Rev. 11-67

Temperley Depo Ex 3
W. R.
1-30-73

STATEMENT IN LIEU OF LOGS

TERMINAL Detroit Steel

DATE 1-19-68

I Howard L. Herrick 417 48 2 575

THAT THE FOLLOWING INFORMATION IS A TRUE AND CORRECT STATEMENT OF MY DUTY STATUS AND THE HOURS WORKED EACH DAY (LINE 1 A CORRECT ENTRY FOR EACH DAY) FOR THE WEEK ENDING 1-19-68 (DATE) (ITEM) AM PM

DATE	HOURS WORKED	DUTY STATUS EACH DAY
1-13-68	0	
1-14-68	0	
1-15-68	0	
1-16-68	0	
1-17-68	0	
1-18-68	0	

SIGNED [signature] (TRANSAMERICAN EMPLOYEE)

[signature]

BEST COPY AVAILABLE

236

SILLY VICKS 1/19/68 1 AM

Tractor Number 4664 | Trailer Number

FAILURE TO COMPLY CAN RESULT IN DISCHARGE

MUST BE FILLED OUT BY DISPATCHER

DRIVER'S LOGS CURRENT AT TIME OF DISPATCH [1] YES
HAS HAD FULL REST REQUIRED [X] YES
HAS AVAILABLE HOURS TO MAKE TRIP [X] YES

DRIVER'S I.D. CARD (FORM 808) NUMBER DATED

DOCTOR'S CERTIFICATE IN DRIVER'S POSSESSION [X] YES

DANGEROUS PLACARDS APPLIED TO VEHICLE [ ]
TRIP LEASE PLACARDS APPLIED TO VEHICLE [ ]

OUTBOUND INSPECTION CERTIFIED TO BY

DRIVER [signature] DISPATCHER

INSPECTED BY [signature] TERMINAL West DATE 1-19-68

IF THIS IS A SINGLE TRIP VEHICLE, THIS SECTION MUST BE FILLED OUT

Name of Owner of Tractor Gary Manby
Make INT. Year 1963
License Number 222466 State Mich.
Name of Owner of Trailer Unit Gary Manby
Make Ballard Year
License Number 700-214 State Mich
If authorized carrier, show the I.C.C. Docket Number MC 29079

ITEM	TRACTOR NOT DEFECTIVE	TRACTOR DEFECTIVE	TRACTOR DESCRIPTION OF DEFECT	SEMI TRAILER OR TRAILER NOT DEFECTIVE	SEMI TRAILER OR TRAILER DEFECTIVE	SEMI TRAILER OR TRAILER DESCRIPTION OF DEFECT
BODY	/			/		
BRAKES	/			-		
COOLING SYSTEM	/					
DRIVE LINE	/					
EMERGENCY EQUIPMENT	/					
ENGINE	/					
EXHAUST SYSTEM	/					
FUEL SYSTEM	/					
GLASS	/					
HORN	/					
TRIP LEASE PLACARD #	/					
LIGHTS (STATE WHICH)	/			-		
REFLECTORS	/			-		
SPEEDOMETER	/					
SPRINGS	/			-		
STEERING	/					
TIRES	/			-		
WHEELS	/			-		
WINDSHIELD WIPER	/					
CROSS BOWS				-		
RIDGEPOLE				-		
TARP				-		
MUD FLAPS	N/A			/		
TURN SIGNALS	-			/		

ANY OTHER ITEMS REQUIRING ATTENTION

I hereby certify that, on the 19 day of Jan 1968, I carefully inspected the equipment described above and that this is a true and correct report of the result of such inspection.

Temperley Depo Ex. 2 WR 1-30-73

JOHNS BROS. GULF SERVICE
16209 DIX ROAD
(Signature of Person Making Inspection) MICHIGAN

IMPORTANT

I hereby certify that, on the date stated above, the person who made the inspection covered by this report was competent and qualified to make such inspection and was duly authorized to make such inspection as a representative of

TRANSAMERICAN FREIGHT LINES, INC.

Date Jan 19 1968 By R. W. Temperley
(Company Official)

IMPORTANT

DEFECTS OCCURRING DURING TRIP (To be filled out by Driver at end of trip.)

ENGINE	TRANSMISSION	DRIVE LINE	LIGHTS	LEAKS TRACTOR	BRAKES - TRAILER	COOLING SYSTEM	OTHER DEFECTS

EXPLAIN DEFECTS | NO DEF | SIGNATURE OF DRIVER

INBOUND INSPECTION

(TRANSAMERICAN EMPLOYEE) (DRIVER)

YELLOW COPY TO ACCOMPANY DRIVER TO DESTINATION TERMINAL AND RETAINED IN FILE
WHITE COPY TO BE FILED AT ORIGIN TERMINAL
EXCEPTION: WHEN SINGLE TRIP VEHICLE IS USED, YELLOW COPY IS [illegible] DEPARTMENT, DETROIT, ATTACHED TO DISPATCH COPY OF SINGLE TRIP LEASE AGREEMENT

235

Washington, D. C. Rev. '62 — (One calendar day-24 hours) — DUPLICATE-Driver retains in his possession for one month

1 (Month) 17 (Day) 63 (Year) — 0 (Total mileage today) — Mich 9929CC — 7290-IC1 (Vehicle numbers-Show each unit)

Temperley Depo WK 1-30-73 — 84 — 80 (Total miles driving today)

I certify these entries are true and correct: Howard Hardwick (Driver's signature in full)

Transamerican (Name of carrier or carriers) — (Name of co-driver)

Det (Main Office Address) — Det mich (Home Terminal Address)

	MID-NIGHT 1 2 3 4 5 6 7 8 9 10 11 NOON 1 2 3 4 5 6 7 8 9 10 11 MID-NIGHT	Total Hours
1: OFF DUTY		15
2: SLEEPER BERTH		
3: DRIVING		3
4: ON DUTY (Not Driving)		6
		24

REMARKS: Trip # 41164 — Great Lake Steel — Benn — Ypsilanti

FROM: Det. mich (Starting Point or Place) — TO: Ypsilanti mich (Destination or turn around point or place)

USE TIME STANDARD AT HOME TERMINAL

Washington, D. C. Rev. '62 — (One calendar day-24 hours) — DUPLICATE-Driver retains in his possession for one month

1 (Month) 21 (Day) 65 (Year) — 318 (Total mileage today) — 9929CC — 7290-IC1 (Vehicle numbers-Show each unit)

Temperley Depo 845 WK 1-30-73 — 318 (Total miles driving today)

I certify these entries are true and correct: Howard Hardwick (Driver's signature in full)

Transamerican (Name of carrier or carriers) — (Name of co-driver) Det mich

(Main Office Address) — (Home Terminal Address)

	MID-NIGHT 1 2 3 4 5 6 7 8 9 10 11 NOON 1 2 3 4 5 6 7 8 9 10 11 MID-NIGHT	Total Hours
1: OFF DUTY		17
2: SLEEPER BERTH		
3: DRIVING		7
4: ON DUTY (Not Driving)		
		24

REMARKS: Trip # 41164 — Anderson Ind. — Indianapolis Ind. — Ypsilanti Mich. — Kansas City Mo. Via Indianapolis Ind.

FROM: Ypsilanti Mich (Starting Point or Place) — TO: Kansas City Mo. Via Indianapolis Ind. (Destination or turn around point or place)

USE TIME STANDARD AT HOME TERMINALS

Washington, D. C. Rev. '62 — (One calendar day-24 hours)

(Month) (Day) (Year) — (Total mileage today) — Mich 9929CC — 7290-IC1

(Total miles driving today)

I certify these entries are true and correct: Howard Hardwick (Driver's signature in full)

(Name of carrier or carriers) — (Name of co-driver)

(Main Office Address) — (Home Terminal Address)

	MID-NIGHT 1 2 3 4 5 6 7 8 9 10 11 NOON 1 2 3 4 5 6 7 8 9 10 11 MID-NIGHT	Total Hours
1: OFF DUTY		
2: SLEEPER BERTH		
3: DRIVING		
4: ON DUTY (Not Driving)		

REMARKS: Trip #41164

237

(Starting Point or Place) — (Destination or turn around point or place)

USE TIME STANDARD AT HOME TERMINAL

INTERSTATE COMMERCE COMMISSION — Washington, D. C. Rev. '62 — DRIVER'S DAILY LOG (One calendar day-24 hours) — Form approved. Budget Bureau No. 80-R213.3 — ORIGINAL-File each day at home terminal — DUPLICATE-Driver retains in his possession for one month

1 (Month) 22 (Day) 68 (Year) — 70 (Total mileage today) — Mich 9929CC — 7290 IC1 (Vehicle numbers-Show each unit)

70 (Total miles driving today)

I certify these entries are true and correct: Howard Hardwick (Driver's signature in full)

Transamerican (Name of carrier or carriers) — (Name of co-driver) Det mich

Det (Main Office Address) — (Home Terminal Address)

	MID-NIGHT 1 2 3 4 5 6 7 8 9 10 11 NOON 1 2 3 4 5 6 7 8 9 10 11 MID-NIGHT	Total Hours
1: OFF DUTY		12
2: SLEEPER BERTH		
3: DRIVING		2½
4: ON DUTY (Not Driving)		9½
		24

REMARKS: Trip 41164 — Fowlerton Ill. — Litchfield Ill. — had a accident across wire road into the rear of the trailer. I had just begun to get back on the road again from clearing my windshield

FROM: Ypsilanti Mich (Starting Point or Place) — TO: Kansas City mo. Via St Louis (Destination or turn around point or place)

USE TIME STANDARD AT HOME TERMINAL

233

1 (Month) 23 (Day) 68 (Year) — 544 (Total mileage today)

Temperley Depo Ex6 W.R 1-30-73 214

Transamerican

(Name of carrier or carriers)

I certify these entries are true and correct

Howard L Hardwick

(Driver's signature in full)

Det much

(Name of co-driver)

(Main Office Address)

(Home Terminal Address)

	Total Hours
1: OFF DUTY	17
2: SLEEPER BERTH	
3: DRIVING	6
4: ON DUTY (Not Driving)	1
REMARKS	24

Trip # 41164

Terre Haute Smithboro Edwardsville Troy Mo Columbia Mexico

ypsi mich Terre Haute Smithboro Edwardsville

FROM: (Starting Point or Place)

TO: Kansas City mo Via St Louis

(Destination or turn around point or place)

USE TIME STANDARD AT HOME TERMINAL

DO NOT TAKE OUT OF BOOK

NOTICE—Prescribed by the INTERSTATE COMMERCE COMMISSION Washington, D. C. Rev. '62

DRIVER'S DAILY LOG

(One calendar day-24 hours)

Form approved. Budget Bureau No. 60-R293.3

ORIGINAL—Filing driver's home terminal

DUPLICATE—Driver to have in his possession for one month

1 (Month) 24 (Day) 68 (Year) — 167 (Total mileage today)

7290-IC1

Vehicle numbers—Show each unit

167 (Total miles driving today)

I certify these entries are true and correct:

Howard Hardwick

(Driver's signature in full)

Transamerican

(Name of carrier or carriers)

Det

(Main Office Address)

(Name of co-driver)

Det

(Home Terminal Address)

	Total Hours
1: OFF DUTY	17
2: SLEEPER BERTH	
3: DRIVING	5
4: ON DUTY (Not Driving)	2
REMARKS	24

Trip # 41164

Det Toledo Columbia Mexico Kansas City Terminal

Ypsi Det Edwardsville Columbia MO

FROM: (Starting Point or Place)

TO: Kansas City mo

(Destination or turn around point or place)

239

USE TIME STANDARD AT HOME TERMINAL

23-68 70

7290 IC1

Temperley Depo 94.7 W.R 1-30-73 71

Transamerican

Det

Howard Hardwick

Det

	13
	2½
	9½
	24

Trip # 41164

Ypsi mich Terre Haute Det Edwardsville at Scene of accident

Kansas City Via St Louis mo

240

Temporary Depot

TELEPHONE REPORT OF ACCIDENT

Ex E W/R 1-30-73

DATE AND TIME 1/22/68 7:45AM DATE AND TIME OF CALL 1/22/68 10:20AM

ASSURED'S NAME TAF

DRIVER Howard Hardrick ADDRESS 470 Hawkins, Ypsilanti, Mich.

HOME TELEPHONE _____ TEL. NO. FOR DRIVER AT SCENE Utlaut Memorial Hosp. Greenville, Ill. 618-664-9819

#1 TRACTOR 63 Intl. CO. NO. 7290 TRAILER Brown CO. NO. IC-1

DAMAGE TO ASSURED EQUIPMENT spread axle on trailer twisted

LOCATION OF ACCIDENT Rt. U.S. 40, 1 mile east of Smithboro, Ill.

DESCRIPTION OF ACCIDENT #1 westbound on U.S. 40 and was pulling back on road off the shoulder. #2 struck the left corner of #1 trailer.

taken to hospital - Utlaut Memorial Hospital - Greenville, Ill.

OTHER DRIVER _____ ADDRESS _____

#2 VEHICLE OWNER _____ ADDRESS _____

YEAR 1957 MAKE Pontiac LICENSE 68 Ill. 339220 DAMAGE front end.

OTHER DRIVER _____ ADDRESS _____

#3 VEHICLE OWNER _____ ADDRESS _____

YEAR _____ MAKE _____ LICENSE _____ DAMAGE CLAIMS BY LEGAL DEPT JAN 25 1968 AM 7,8,9,10,11,12 1 2 3 4 5 6

INJURED NAME #2 driver ADDRESS _____

NAME _____ ADDRESS _____

WITNESSES NAME _____ ADDRESS _____

NAME _____ ADDRESS _____

POLICE NAME OF OFFICER AND LOCATION Illinois State Police TICKETS #1-improperly parked vehicle

CARGO steel DAMAGE _____

LOADED FROM Detroit, Mich. SCRIPT _____ DESTINATION Kansas City, Mo.

WHAT HAS BEEN DONE WITH CARGO? _____

WHAT TERMINAL HAS BEEN NOTIFIED? no

ADJUSTER CALLED yes NAME Crossroads Claim Service ADDRESS Effingham, Ill.

TIME CALLED 10:35AM NAME OF ADJ. HANDLING FILE _____

COMMENTS:

241

E.Swain

PERSON HANDLING REPORT

1-30-73 Ex 9

Temporary Depot

MOTOR CARRIER ACCIDENT REPORT

1. Name of carrier: Transamerican Freight Lines, Inc. 2. Are you a Class I motor carrier? ☑ Yes ☐ No
3. Principal business address: 1700 W. Waterman, Detroit, Michigan
4. Type of carrier (Common, contract, exempt, private etc.): Common MC No. 10761
5. Date accident occurred: January 22, 1968 Day of week: Mon Hour: 7:30 ☑ A.M. ☐ P.M. ☐ Noon ☐ Midnight
6. Place where accident occurred. State: Illinois County: Bond City: n/a
7. On U. S. 40 (Street or highway name or none) At ☐ Near ☑ Smithboro, Illinois (Intersecting street or highway, house number, bridge, railroad crossing, or other landmark)
8. The run on which this accident occurred began at: Detroit, Michigan (City or town—State) on 1-21-68 (Month—day) at 6:00 ☐ A.M. ☑ P.M.
9. And was intended to end at: Kansas City, Missouri (City or town—State) on 1-24-68 (Month—day) at 1:00 ☐ A.M. ☑ P.M.
10. If a turn-around run, the most distant point was intended to be: Not a turn around run. (City or town—State)

YOUR VEHICLE

11. Type of Vehicle	Year Model	Manufacturer's Name	Model and Serial No.	Type of Body	Company No.	Weight Empty	Weight of Payload
Truck (pick-up)							
Tractor	1967	Intl.	FD21837C	Tractor	Extra		
Semitrailer	1965	Brown	TCD63	Trailer	Extra		
Full trailer							
Pole trailer							
(Specify other)							

14. Over-all length of vehicle or combination 52 ft. 15. Kind of cargo at time of accident Sheet steel
16 (a). Number of persons on vehicle (including driver) One 16 (b). Was there a relief driver on this vehicle? ☐ Yes ☑ No 17. Was operation a driveway? ☑ Yes ☐ No
18 (a). Was vehicle equipped with a sleeper berth? ☐ Yes ☑ No 18 (b). Location of berth: ☐ In cab ☐ Other (Specify other location)
19 (a). Is the power unit owned by you (the motor carrier)? ☐ Yes ☑ No 19 (b). If not owned by you, is it owned by the driver? ☑ Yes ☐ No

YOUR DRIVER

20. Name and address: Howard L. Hardrick, 470 Hawkins, Ypsilanti, Michigan (First name) (Street and number or RFD) (City) (State)
21. Age 22 22. Sex M 23. Social Security No. 417-48-2575 24. Length of time employed by you Trip Lease (Years and months)
25. Experience driving motor vehicle 5 yrs. (Years and months) 26. Experience driving engine-powered commercial vehicle 5 yrs. (Years and months) 27. Experience driving type vehicle in this accident 6 yrs. (Years and months)
28. Hours on duty since last 8 consecutive hours off duty 12 hrs. 29. Hours actually driving during period of 8 consecutive hours off duty 12 hrs.
30. Condition of Driver: Sick ☐ Had been drinking ☐ Dozed at wheel ☐ Apparently normal ☑ Physical defect or other condition ☐ (Specify defect or condition)

TYPE OF ACCIDENT

31. ☐ Noncollision—overturned in roadway ☐ Noncollision—ran off roadway ☑ Collision with private car (Pedestrian, private car, truck, fixed object, etc.) ☐ Other (Specify)
32. Did this accident involve fire or explosion? ☐ Yes ☐ No

OTHER VEHICLES INVOLVED. (Use section about for additional vehicles involved)

33. William Wears, Effingham, Illinois (Name of owner of vehicle No. 2) (Address—city and State) Type of vehicle pass. MC— (I.C.C. No., if any)
34. (Name of owner of vehicle No. 3) (Address—city and State) Type of vehicle MC— (I.C.C. No., if any)

WITNESSES.

35. None (Name) (Address) (Age—if by insurance)
36. (Name) (Address) (Age—if by insurance)

(OVER)

BUREAU OF MOTOR CARRIER SAFETY 38-1

Receipt is acknowledged of your report of accident dated January 22, 1968 sent as follows:
Date of occurrence (Month) (Day) (Year) Hour 7:30 ☐ A.M. ☐ P.M.
City or town U. S. 40 n/a Howard Hardrick Illinois
Highway None Driver's - One 2,000.00
Fatalities (Number) Injuries (Number) Property damage, $ (Dollars)
Name of Transamerican Freight Lines, Inc. 10761 (MC Number)
1700 W. Waterman (No. and street)
Detroit, Michigan 48209 (City and State)

This portion to be completed by reporting carrier.

DO NOT DETACH

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(OVER)

The Motor Carrier Accident Report, including the reverse side of this stub, must be completed in triplicate, by the motor carrier. The original and one copy shall be filed with the District Director, Bureau of Motor Carrier Safety, of the district in which the motor carrier has his or its principal place of business (as required by Section 194.5 of the *Motor Carrier Safety Regulations*). The remaining copy shall be retained in the carrier's files.

The original of this stub will be returned to the motor carrier as an acknowledgment of receipt of the report. At the same time, three copies of the accident report form will be sent for the carrier's use in reporting future accidents.

REPRODUCED AND SOLD BY [illegible]

PROPERTY DAMAGE. Enter approximate damage, in dollars, for each vehicle and cargo damaged.

Use another sheet for additional vehicles	Truck, tractor, or bus	Check if total loss	Semitrailer	Check if total loss	Full trailer	Check if total loss	Other type	Check if total loss	Cargo	Check if total loss
37. Your vehicle—No. 1	$		$ 500.00		$		$		$ 00.00	
Vehicle No. 2	$ 1,500	X	$		$		$		$	
Vehicle No. 3	$		$		$		$		$	

Damage to other property: none ($) (Specify property damaged and indicate damage) (Amount)

PERSONS INJURED OR KILLED. (Use another sheet for additional persons injured or killed) (Estimate age if necessary)

38. Name: Sandra K. Weers Address: Effingham, Illinois Age: 23
☐ Killed outright. ☒ Serious injuries. ☐ Died later. ☐ Minor injuries. ☐ Affected by carbon monoxide. ☐ Burned. ☒ Driver. ☐ Relief. ☐ Pedestrian. ☐ Helper. ☐ Passenger. ☐ Other ____ ☒ In vehicle No. 1. ☐ In other vehicle.

39. Name ____ Address ____ Age ____
☐ Killed outright. ☐ Serious injuries. ☐ Died later. ☐ Minor injuries. ☐ Affected by carbon monoxide. ☐ Burned. ☐ Driver. ☐ Relief. ☐ Pedestrian. ☐ Helper. ☐ Passenger. ☐ Other ____ ☐ In vehicle No. 1. ☐ In other vehicle.

40. Name ____ Address ____ Age ____
☐ Killed outright. ☐ Serious injuries. ☐ Died later. ☐ Minor injuries. ☐ Affected by carbon monoxide. ☐ Burned. ☐ Driver. ☐ Relief. ☐ Pedestrian. ☐ Helper. ☐ Passenger. ☐ Other ____ ☐ In vehicle No. 1. ☐ In other vehicle.

41. VEHICLE MOVEMENTS. Vehicle #1 / #2

☒ Straight ahead. ☐ / ☐
☐ Turning right. ☐ / ☐
☐ Turning left. ☐ / ☐
☐ "U" turn. ☐ / ☐
☐ Start from curb. ☐ / ☐
☐ Stopped or parked. ☐ / ☐
☐ Backing. ☐ / ☐ Start from shoulder

Check below if applicable:
☐ / ☐ Jack-knifing.
☐ / ☐ Overtaking.
☐ / ☐ Weaving.
☐ / ☐ Skidding.
☐ / ☐ Wrong side.

42. VEHICLE DEFECTS.
☐ Tires. ☐ Brakes. ☐ Engine. ☐ Lights. ☐ Fuel line. ☐ Coupling. ☐ Steering. ☐ Wheel or part. ☐ Axle. ☐ Spring or part. ☐ ____ (Other)
☒ No defect.

43. ROADWAY.
☒ Straight. ☐ Curve.
☐ On grade. ☒ Level. ☐ Hillcrest.
☐ Dry. ☒ Wet. ☐ Muddy. ☐ Snowy. ☐ Icy. ☐ Oily.
☒ 3-lane. ☐ 4-lane. ☐ 6-lane. ☐ Divided. ☐ ____ (Other)
☒ Lanes marked. ☐ Lanes unmarked.
☐ No road defects. ☐ Holes, ruts, etc. ☐ Loose material. ☐ ____ (Other)

44. LIGHT.
☐ Daylight. ☐ Dark. ☐ Dusk. ☒ Dawn.

45. WEATHER.
☐ Clear. ☐ Rain. ☐ Snow. ☒ Sleet. ☐ Fog. ☐ ____ (Other)

46. DRIVER'S ACCOUNT OF ACCIDENT.
I was pulled off the road to clean my windshield, I started to pull back onto the highway and was almost all the way back onto the highway when Veh.#2 come out of the fog and hit left rear of trailer.

This accident was investigated by: Howard Hardrick (Name of police officer) (Badge No.) (Dept.)

(Driver's name)

47. ACCOUNT BY RESPONSIBLE OFFICIAL OF CARRIER.
In routine audit of our accident register against file we discovered that there had been no indication of our having put filed MCT-5CT on this accident therefore this filing.
Investigation disclosed thatddriver had pulled off the road to clean windshield and started to go again when Veh.#2 traveling fast in heavy fog struck rear of trailer shortly after unit was undoi way.

5-17-68 Director C. Blanco (Date) (Title)

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FROM [illegible] 201 TO [illegible] 833 1-10-[illegible] DATE

VIA Temperley Depot Ex 10 WR 1-30-73

No. 41164

DRIVER	OWNER
NAME Howard L. Hendrick	Brada Miller Freight System, Inc. Ray Worby
STREET ADDRESS 470 Hawkins	17628 Collegate, [illegible] 369
CITY AND STATE Ypsilanti Mich	Dearborn Hts, Michigan
DRIVERS' SOC. SEC. NO. 417 48 2975	

IF EQUIPMENT BELOW HAS NO ACCOUNTING NUMBER, SHOW THE PERMIT NUMBERS NECESSARY FOR TRIPS THRU NEW YORK AND OHIO

TRACTOR					TRAILER		VIA		
ACCT. NO. OR N. Y. PERMIT	EMPTY WEIGHT	OHIO PERMIT NO.	G/D	AXLES	ACCT. NO. OR N. Y. PERMIT	MAX. GR. WT	CAN	NEW YORK	OHIO
A /C					A/C				

FOR HOME OFFICE USE ONLY

FILL IN FROM BILLS FOR SHIPMENT ON LOAD — SHOW RENTAL PERCENTAGE FOR EACH BILL BELOW REVENUE

									TOTAL
REV. PRO.	9327982	Rev. Pro 9366574	13[illegible]						
WEIGHT	/C	4720	47[illegible]						4720
TRIP REVENUE		548.22	54[illegible]						548.22
RENTAL PERCENTAGE	73								XXXXX

PAY DATA

GROSS RENTAL	400.20
WAGES @ 24%	N/A
3% VAC. PAY (DRIVERS ONLY)	N/A
TOTAL WAGES	N/A

ADVANCES		CITY MAN		MISCELLANEOUS			TOTAL DEDUCTIONS
CHECK NUMBER	AMOUNT	TERM. NO.	AMOUNT	CODE	AMOUNT	DESCRIPTION	
[illegible]	100.00						
[illegible]	75.00						

TRIP LEASE ONLY	GROSS RENTAL	TOTAL DEDUCTIONS	NET REMITTANCE PAID	CHECK NUMBER	DATE PAID	REMITTANCE NO.
	400.20	175.00	225.20	21503	2/24/68	[illegible]

BEFORE DELIVERY DRIVER TO CONTACT
TERMINAL Ecrs Keys
TEL. NO.
PAY OFF ONLY AT [illegible]

INSTRUCTIONS:
Driver to follow certificated routes only

DRIVER MUST SIGN STATEMENT BELOW
I CERTIFY THAT I (WAS ☒ WAS NOT ☐) INVOLVED IN ANY ACCIDENT ON THIS TRIP AND A FULL REPORT HAS BEEN MADE TO TRANSAMERICAN
DRIVER [signature]

APPROVAL
Frank C. Tiletta 2-24-68

TRIP RECORD - STEEL DIVISION

PAY COPY - FWD. TO DETROIT WITH PETTY CASH 3

244

FOR REVISION DEPT. USE

GX AS PAID

ISSUE DIS

AUTHORITY Temporary Depot By 11 W R 1-30-73

RATE AUDIT COPY

Transamerican Freight Lines, Inc.

NATION WIDE SERVICE

AMOUNT PAID

AUTHORITY C/N

BDR NO.

2A

9327988

SHIPPER NAME AND ADDRESS	Cant read - Temporary Depot Used. Aerco Aircraft Michigan	CONSIGNEE NAME AND ADDRESS	Illegible Warehouse 7500 [illegible] Detroit City Michigan Lenox City Co.

ACCTG. TERM	DATE	ROUTING, B/L NO. OR	OWNER'S NAME	EQUIPMENT NO.	TRIP NO.
	1-29-73	1-[illegible]-DATA	Carlisle Body	T/C T/C	T.1 41114

RECEIVABLE AMT.	TFL REV.	ORIGIN CARRIER DUE-REV.	BEYOND CARRIER DUE-REV.	NAME OF BEYOND CARRIER
$47.20	223.20			

ORIGIN	DESTINATION	ACCTG. TERM	TYPE TRAFFIC	COMMODITY	CUST. CODE	INTERCHANGE POINT OR PAYOFF TERMINAL
2J1	225	223	1			

NO. PIECES	DESCRIPTION AND MARKS	WEIGHT	RATE	CHARGES
6	Lifts Steel Sheets	47250	1.16	547.10 Collect
	Canceled out [illegible]			

IC VO PAID DATE

245

Transfer Dep Depot By 12 W R 1-30-73

9327988

[illegible] Carlisle Body T/C T/C T.1 41114

6	Lifts Steel Sheets	47250	1.16	547.10	Collect
	Canceled out [illegible] 9327922				

246

BEST COPY AVAILABLE

FOR REVISE NOTICE USE

RATE AUDIT COPY

Transamerican Freight Lines, Inc.

NATION WIDE SERVICE

CK AS PAID

ISSUE BOB

AUTHORITY

AMOUNT PAID

AUTHORITY C/N

BOB NO.

2A

9327982

Temperley Depo
Ex B WR
1-30-73

SHIPPER NAME AND ADDRESS	CONSIGNEE NAME AND ADDRESS
[illegible]	[illegible]

DATE	ROUTING, B/L NO. OR DATE	OWNER'S NAME	EQUIPMENT NO.	TRIP NO.
1 10 73	[illegible]	[illegible]	[illegible]	[illegible]

RECEIVABLE AMT.	ITL REV.	ORIGIN CARRIER	BEYOND CARRIER	NAME OF BEYOND CARRIER
		DUE-REV.	DUE-REV.	

ORIGIN	DESTINATION	ACCIG. TERM	TYPE TRAFFIC	COMMODITY	CUST. CODE	INTERCHANGE POINT OR PAYOFF TERMINAL
221	225		1			

NO. PIECES	DESCRIPTION AND MARKS	WEIGHT	RATE	CHARGES
	Steel Sheets Approx	44000	1.15	
	For Delvy Only Bols will issue rev bill			

ACCIG. TERM 10 V2 PAID DATE

247

BEST COPY AVAILABLE

[illegible] STRAIGHT BILL OF LADING — SHORT FORM

From GREAT LAKES STEEL DIVISION
NATIONAL STEEL CORPORATION
At ECORSE, (DETROIT), MICH.

DATE

AGENT'S No.

BILL OF LADING No. 1-03-1218
-1215

CONSIGNED TO:

[illegible]

[illegible]

F.O.B. DEL. MILL Carrier or Route [illegible] Time Departed 12:27 AM

COLLECT PREPAID

VEHICLES NOS. TRUCK OR TRACTOR	SEMI-TRAILER	TRAILER	NUMBER OF PACKAGES	DESCRIPTION PER BILL OF LADING	WEIGHT	FREIGHT RATE	CHECK COLUMN	
129	1		6	LIFTS STEEL SHEETS	47250	1.16		
				DUNNAGE 1500#			548.	10
							400.	11
				To Be Delivered At (Time) (Date)				

Terminal Depot 64
1-30-73

THIS SHIPPING ORDER must be legibly filled in in Ink, in Indelible Pencil, or in Carbon, and retained by the agent of Carrier.

THE PROPERTY DESCRIBED ABOVE, IN APPARENT GOOD ORDER, EXCEPT AS NOTED (CONTENTS AND CONDITION OF CONTENTS OF PACKAGES UNKNOWN), MARKED, CONSIGNED, AND DESTINED AS INDICATED ABOVE, WHICH SAID CARRIER (THE WORD CARRIER BEING UNDERSTOOD THROUGHOUT T. IS CONTRACT AS MEANING ANY PERSON OR CORPORATION IN POSSESSION OF THE PROPERTY UNDER THE CONTRACT) AGREES TO CARRY TO ITS USUAL PLACE OF DELIVERY AT SAID DESTINATION, IF ON ITS ROUTE, OTHERWISE TO DELIVER TO ANOTHER CARRIER ON THE ROUTE TO SAID DESTINATION. IT IS MUTUALLY AGREED, AS TO EACH CARRIER OF ALL OR ANY OF SAID PROPERTY OVER ALL OR ANY PORTION OF SAID ROUTE TO DESTINATION, AND AS TO EACH PARTY AT ANY TIME INTERESTED IN ALL OR ANY OF SAID PROPERTY, THAT EVERY SERVICE TO BE PERFORMED HEREUNDER SHALL BE SUBJECT TO ALL THE TERMS AND CONDITIONS OF THE UNIFORM DOMESTIC STRAIGHT BILL OF LADING SET FORTH (1) IN OFFICIAL, SOUTHERN, WESTERN AND ILLINOIS FREIGHT CLASSIFICATIONS IN EFFECT ON THE DATE HEREOF, IF THIS IS A RAIL OR A RAIL-WATER SHIPMENT, OR (2) IN THE APPLICABLE MOTOR CARRIER CLASSIFICATION OR TARIFF IF THIS IS A MOTOR CARRIER SHIPMENT.

SHIPPER HEREBY CERTIFIES THAT HE IS FAMILIAR WITH ALL THE TERMS AND CONDITIONS OF THE SAID BILL OF LADING, INCLUDING THOSE ON THE BACK THEREOF, SET FORTH IN THE CLASSIFICATION OR TARIFF WHICH GOVERNS THE TRANSPORTATION OF THIS SHIPMENT, AND THE SAID TERMS AND CONDITIONS ARE HEREBY AGREED TO BY THE SHIPPER AND ACCEPTED FOR HIMSELF AND HIS ASSIGNS.

Material as covered by this B'll of Lading has been placed on the truck specifically under Driver's Instructions and MUST BE PROTECTED FROM WEATHER IN TRANSIT.

RECEIVED, SUBJECT TO THE CLASSIFICATIONS AND TARIFFS IN EFFECT ON THE DATE OF THE ISSUE OF THIS BILL OF LADING.

Place "X" in block applying to loading conditions under which shipment is transported.

- ☐ MAXIMUM LOAD-HIGHWAY WEIGHT RESTRICTION.
- ☐ MAXIMUM WEIGHT POSSIBLE UNDER DRIVER'S LOADING REQUIREMENTS
- ☐ MAXIMUM POSSIBLE WEIGHT LOADED

COLLECT ON DELIVERY

$ _____

AND REMIT TO
GREAT LAKES STEEL DIVISION
Ecorse (Detroit), Michigan

C.O.D. CHARGE $ _____
TO BE PAID BY CONSIGNEE

Subject to Section 7 of Conditions of applicable Bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

GREAT LAKES STEEL DIVISION

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
(The signature here acknowledges only the amount prepaid.)

Advanced $ _____

"If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

GREAT LAKES STEEL DIVISION, Shipper
NATIONAL STEEL CORPORATION

J I [illegible]/LLS

B/L No. 1-03-1218

Agent

Per [illegible]

Street post office address of shipper: Ecorse (Detroit), Mich.

FORM C-2206D (REV. 3-68)

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Address 17516 Dix Melvindale, Michigan
Street number City State

Date Jan 18, 1968

TO:
Brada Miller Freight System
3120 Lonyo
Detroit Michigan

Temperley Expt. 15
W.K
1-30-73

Gentlemen:

Mr. Howard Hardick Social Security No. 417-48-2575 has made application to this Company for a position as Driver and states that he was employed by you as Driver from 1967 to 1968

Will you kindly reply to the inquiry below respecting this applicant? Your reply will be held in strict confidence and will in no way involve you in any responsibility.

For your convenience in replying by return mail, we enclose stamped self-addressed envelope.

Very truly yours,

F. Wiley
Office Manager

1. Is employment record with your Company correct as stated above? 12/1/67 to 12/30/67 (date of last log)
2. What kind of work did he perform? Bleet Driver
3. Had he custody of money or valuables while in your employ? _____
4. If so, were his accounts properly kept? _____
5. Did he operate a motor vehicle for you? Yes
6. If so, what type or types? Semi Tractor & Trailer
7. How many accidents while in your employ? None
8. Was he — Laid off _____ Discharged _____ Resigned XXX
9. What was the reason for his leaving your employ? No reason given-Did not advise was leaving
10. Were his habits sober, honest and proper while employed by you? _____
11. Do you regard him competent for the position applied for? _____

	EXCELLENT	GOOD	FAIR	POOR
Quality of work				
Co-operation with others				
Safety habits				
Personal habits				
Driving skill				

Any other remarks: Was not with company long enough to evaluate

Date: 1/23/67 For Brada Miller Freight System (Name of Company) By Robert S. Campbell

FORM 802

248

In the United States District Court
Southern District of Illinois
Southern Division

(Title omitted in printing)

MOTION FOR SUMMARY JUDGMENT OF BRADA MILLER FREIGHT SYSTEM, INC.

(Filed February 23, 1973)

Comes now defendant Brada Miller Freight System, Inc. and files its Motion for Summary Judgment against defendant Transamerican Freight Lines, Inc. and as grounds for said motion states:

That the pleadings, depositions, answers to interrogatories and exhibits on file show that the indemnity provision of the trip lease, set out in paragraph 3 of **Amended Crossclaim of Defendant Transamerican Freight Lines, Inc.** is contrary to public policy and is unenforceable.

That there are attached hereto certain exhibits to the deposition of Ronald William Temperley taken in this cause, being Exhibits 1, 2, 4, 5, 6, 7, 9 and 10 and referred to in Memorandum of Law in support of this motion. (A typewritten copy of the form of Exhibit 1 is attached for easier reading.)

Wherefore, there being no genuine issue as to any material fact, defendant Brada Miller Freight System, Inc. prays for Summary Judgment and that the Crossclaim of defendant Transamerican Freight Lines, Inc. be dismissed.

(Signature omitted in printing.)

(Certificate of service omitted in printing)

In the United States District Court
Southern District of Illinois
Southern Division

(Title omitted in printing)

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF BRADA MILLER FREIGHT SYSTEM, INC. FOR SUMMARY JUDGMENT

(Filed February 23, 1973)

In this action, Transamerican Freight Lines, Inc. (Transamerican) in its Amended Crossclaim seeks to recover from Brada Miller Freight System, Inc. (Brada Miller) the amount paid by Transamerican to settle plaintiff's claim.

Transamerican alleges that on January 18, 1968 Brada Miller leased a tractor and trailer to Transamerican by means of a "Lease Agreement With Authorized Carriers" purportedly signed by Harold L. Hardrick on behalf of Brada Miller. A copy of the "Lease Agreement With Authorized Carriers," also known as a trip lease, is attached to Brada Miller's Motion for Summary Judgment (Temperly deposition Exhibit 1). Brada Miller denies that Hardrick had authority to enter into the trip lease.

In any event, on January 22, 1968, the tractor and trailer while being operated by Hardrick on a trip from Detroit to

Kansas City, was involved in an accident near Smithboro, Illinois, in which plaintiff was injured. Plaintiff sued both Transamerican and Brada Miller and during trial proceedings Transamerican settled with plaintiff. It is the amount of this settlement (plus expenses) which Transamerican seeks to recover from Brada Miller.

Transamerican's cause of action is based solely on the indemnity provision of the trip lease set out in Transamerican's Amended Crossclaim. It is the position of Brada Miller that the indemnity provision is contrary to the regulations of the Interstate Commerce Commission (ICC), is against public policy and is unenforceable by Transamerican.

Assuming *arguendo* that Transamerican and Brada Miller did enter into a trip lease, such lease was governed by the following provision of the Interstate Commerce Act:

> (e) . . . the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property
>
> > (2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles . . . 49 USC 304(e) (1958).

Pursuant to such delegation of authority the ICC enacted regulations governing these matters.

> 49 C.F.R. § 1057.4 . . . authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) **Contract requirements.** The contract, lease or other arrangement for the use of such equipment:

(4) **Exclusive possession and responsibilities.** Shall provide for the exclusive possession control and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except: (exceptions not pertinent).

Transamerican's printed form of trip lease conforms to the ICC regulation:

4. It is mutually understood and agreed, that the First Party (Transamerican) during the term of this lease shall have the control and responsibility for the operation of said equipment in respect to the public, shippers and Interstate Commerce Commission for such period that said equipment is operated under the terms of this lease as provided in Paragraph 1 hereof.

In a very recent case decided by the U. S. Court of Appeals for the Seventh Circuit, **Alford v. Major, 470 F2d 132 (1972),** the court was faced with a fact situation almost identical to this case.

In **Alford,** Major Truck Lines (Major) leased a truck and driver from Carriers Inc. (Carriers) under a trip lease which provided that Carriers was to indemnify Major from losses suffeed by Major because of third party claims brought against Major as a result of the negligence of the driver furnished by Carriers. Plaintiff was killed in an accident caused by the negligence of the truck driver. The wrongful death action was settled by Major which sought to recover from Carriers under the indemnity provision of the trip lease. In denying recovery, the Court stated:

l.c. 135 "Therefore, since the indemnification clause would permit Major to circumvent the regulations' requirement

that leased carriers exert actual control over the leased equipment and the borrowed drivers, we find that the indemnification clause is unenforceable."

In the present case Transamerican included in its printed trip lease form a paragraph (4.) which sought to incorporate in the trip lease the control provisions of 49 CFR § 1057.4. In addition, Transamerican did in fact exercise complete control over the driver Hardrick and over the tractor and trailer unit as indicated by the following:

Inspection

49 CFR § 1057.4(c) provides:

It shall be the duty of the authorized carrier, before taking possession of the equipment, to inspect the same or to have the same inspected by a person who is competent and qualified to make such inspection and has been duly authorized by such carrier to make such inspection as a representative of the carrier, in order to insure that the said equipment complies with the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation.

Ronald Temperly, a district field supervisor of Transamerican's testified in his deposition that Transamerican did in fact have the equipment inspected before the trip in question and that Transamerican completed a vehicle inspection report required by the ICC. (See Temperly deposition, pages 37 and 38; Temperly Deposition—Exhibit 2, attached to Motion for Summary Judgment).

Control of Driver

The driver of the vehicle involved in the accident, Howard Hardrick, furnished Transamerican with Drivers Daily Logs as

required by ICC regulations. (Temperly Deposition pages 39 through 45 and Temperly Deposition Exhibits 4 through 7, attached to Motion for Summary Judgment).

The Drivers Daily Logs in each instance and on the day of the accident (1-22-68) show Transamerican as the carrier. The accident was reported to Transamerican and Hardrick reported his activities to Transamerican for each hour of each day of the trip by means of the Drivers Daily Log.

Transamerican furnished Hardrick with a Trip Record (Temperly Deposition Exhibit 10, attached to Motion for Summary Judgment). The Trip Record shows that Transamerican advanced money to Hardrick for fuel, lodging, food and emergencies (Temperly Deposition page 56). By the Trip Record, Hardrick was instructed "to follow certified routes only." The routes referred to were those assigned to Transamerican and Hardrick was furnished with a copy of Transamerican's ICC authority showing those routes. (Temperly Deposition pages 57 through 59).

ICC Authority

At the time of the accident, the tractor and trailer were being operated from Detroit to Kansas City under authority granted Transamerican by the ICC. (Temperly Deposition page 33). During the trip a placard was affixed to the side of the tractor as per ICC regulations. *49 CFR 1057.4(d)* and *49 CFR 1058*. The placard remained on the truck throughout the trip and read: "Operated by Transamerican Freight Lines, Detroit, Michigan." The permit number assigned to Transamerican by the ICC was printed on the placard. (Temperly Deposition pages 23 through 27).

Transamerican reported this accident to the ICC (Temperly Deposition Exhibit 9). This was done pursuant to ICC regulation and on an accident report form provided by the ICC (Temperly Deposition pages 46 through 47).

Transamerican does not dispute, indeed there could be no dispute, that Transamerican had complete control of the truck and driver and complete responsibility "for the operation of said equipment in respect to the public, shippers and Interstate Commerce Commission" (trip lease, paragraph 4). The trip was made under an ICC permit held by Transamerican.

The attempt by Transamerican to shift its burden and responsibility by relying on the indemnity provision of the lease is contrary to the letter and spirit of the ICC regulations. Enforcement of the indemnity provision would tend to undermine the purpose of the ICC regulations and would be contrary to public policy. The Court in the *Alford* case (supra) fully considered an identical situation and reached a conclusion contrary to the position of Transamerican in the present case.

It is respectfully submitted that on the authority of *Alford v. Major* the Court should sustain Brada Miller's Motion for Summary Judgment.

(Signature omitted in printing.)

(Certificate of Service omitted in printing)

The Opinion and Order of the United States District Court for the Southern District of Illinois Southern Division filed April 25, 1973, are printed in the Petition for a Writ of Certorari at A-1 to A-5.

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit is printed in the Petition for a Writ of Certiorari at A-6 to A-13.

Supreme Court, U. S.
FILED
FEB 18 1975
MICHAEL RODAK, JR., CLERK

Nos. 73-1750 and 74-54

In the Supreme Court of the United States

OCTOBER TERM, 1974

PITT COUNTY TRANSPORTATION COMPANY, PETITIONER

v.

CAROLINA FREIGHT CARRIERS CORPORATION, FOR THE USE AND BENEFIT OF LIBERTY MUTUAL INSURANCE COMPANY

AND

OLD REPUBLIC INSURANCE COMPANY

TRANSAMERICAN FREIGHT LINES, INC., PETITIONER

v.

BRADA MILLER FREIGHT SYSTEMS, INC., ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND THE SEVENTH CIRCUITS

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

ROBERT H. BORK,
Solicitor General,

THOMAS E. KAUPER,
Assistant Attorney General,

CARL D. LAWSON,
Attorney,
Department of Justice,
Washington, D.C. 20530.

FRITZ R. KAHN,
General Counsel,

BETTY JO CHRISTIAN,
Associate General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1750

PITT COUNTY TRANSPORTATION COMPANY, PETITIONER

v.

CAROLINA FREIGHT CARRIERS CORPORATION, FOR THE USE AND BENEFIT OF LIBERTY MUTUAL INSURANCE COMPANY

AND

OLD REPUBLIC INSURANCE COMPANY

No. 74-54

TRANSAMERICAN FREIGHT LINES, INC., PETITIONER

v.

BRADA MILLER FREIGHT SYSTEMS, INC., ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND THE SEVENTH CIRCUITS

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

This memorandum is filed in response to the Court's letter of October 15, 1974, inviting the Solicitor General to express the views of the United States.

STATEMENT

In both of these cases motor carriers (lessees) certificated by the Interstate Commerce Commission have sought indemnification from the lessors of equipment utilized in performing transportation services that the lessee is authorized to perform. In each case the lessee (or its insurer) paid a claim for personal injuries allegedly caused by negligence of the driver of the leased vehicle. The drivers themselves were supplied by the lessors of the equipment. In both cases written lease agreements provided that the lessor, which furnished both equipment and driver, would indemnify the lessee for any liability incurred as a result of defects in the equipment or negligence of the driver. The lessors in both cases declined to honor the indemnification clause, contending that the clause was invalid because it conflicted with the equipment lease requirements promulgated by the Interstate Commerce Commission.

The relevant Commission regulation with respect to the lease in No. 73-1750, *Pitt County Transportation Co.* v. *Carolina Freight Carriers Corp.*, provides in pertinent part (49 C.F.R. 1057.4(a)):

> *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:
>
> * * * * *
>
> (4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement,* * *
>
> * * * * *

The relevant Commission regulation with respect to the lease in No. 74-54, *Transamerican Freight Lines, Inc.* v. *Brada Miller Freight Systems, Inc.*, provides that the carriers must agree "in writing that control and responsibility for the operation of the equipment shall be that of the lessee * * *." 49 C.F.R. 1057.3(a).

In *Transamerican* the Court of Appeals for the Seventh Circuit concluded that the indemnification provisions in the lease excessively diminish the lessor's control and responsibility, and therefore are inconsistent with the Commission's regulations. In *Pitt County* the Court of Appeals for the Fourth Circuit concluded that the indemnification provisions do not violate the Commission's regulations.

ARGUMENT

1. These two cases present a clear conflict among the circuits in interpreting the relevant Commission regulations.[1] Indemnity clauses are often used in equipment leases in the trucking industry, and the present controversy about their validity has created unnecessary confusion and uncertainty for the carriers affected. We therefore believe that certiorari should be granted to resolve the conflict.[2]

2. The equipment leasing regulations under consideration here were formulated in Ex Parte No. MC-43, an extended rulemaking proceeding from 1950 to 1956. See 51 M.C.C. 461; 52 M.C.C. 675; 64 M.C.C. 361; 68 M.C.C. 553. Because only a properly certificated carrier may haul freight, those regulations—although recognizing that

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[1]There is no operative difference between the control and responsibility requirements of Sections 1057.3(a) and 1057.4(a)(4). Section 1057.4 includes additional requirements, not relevant to the indemnification controversy, from which Section 1057.3(a) exempts certain carriers.

[2]The Fifth Circuit (see *Allstate Insurance Co.* v. *Alterman Transport Lines, Inc.*, 465 F.2d 710) also has held that indemnification clauses are permissible.

properly certificated carriers legitimately may lease motor vehicle equipment from others in order to operate to the full extent of their authorities—prevent carriers from entering into ostensible "equipment leases" under which a "lessee" with operating authority simply lends its name and its certificate to a "lessor" that actually performs the transportation service. The control and responsibility regulations forbid such arrangements, which in reality constitute illegal leasing of operating authority from the "lessee" of the equipment to the "lessor" of the equipment (*Performance of Motor Com. Car. Service by Riss & Co., Inc.*, 48 M.C.C. 327, 360):

> In any case of a person claiming to be a motor carrier through the use of the vehicles of others, it is of the utmost importance to regulation that it have and exercise direction and control of the operations and of the persons engaged therein. For otherwise an unworkable situation is created, that is, one, for example, in which neither the Commission nor the person claiming to be the carrier would have any immediate and direct control over safety, hours of service of employees, and other matters pertaining to safe, adequate, and efficient service, and the safe operation of vehicles on the highways, all of which were intended by the act. In other words, as to these important features of motor-carrier operation, our regulation thereof, as required by the act, would be negatived to an inoperative degree, as the actual operator would not be subject to our regulations or to the direction and control of the person claiming to be the carrier and subject to our jurisdiction.

Although the regulations reflect different treatment for leases of various types of equipment, they generally require that (1) the lease be in writing and provide that the

lessee assumes control and responsibility for the operation of the equipment; (2) the lessee conduct a safety inspection before taking possession of the equipment; and (3) the equipment be identified as that of the lessee. The regulations make no provision with regard to indemnification clauses and the narrow question presented here—whether the presence of such an indemnity clause in and of itself constitutes a lack of control in the lessee—was not addressed in the rulemaking proceeding.

3. The Commission believes that its regulations neither sanction nor forbid indemnification agreements. Although the regulations require the lessee to assume full "control and responsibility," the regulations do not altogether proscribe indemnity clauses. If the lessee otherwise assumes full control and acknowledges its personal liability to the injured party, it is not forbidden to seek indemnity from the lessor. The goal underlying the regulations—the prevention of leases of operating authority in the guise of leases of equipment—is not affected by indemnification agreements where other adequate indicia of control and responsibility are present.[3]

The Commission believes, however, that an indemnity clause is a factor to be considered in determining whether

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[3]In the course of the rulemaking there was some testimony regarding the indemnification of lessees by owner-operators. The Commission stated (52 M.C.C. at 690):

> Protection of the public through insurance is reduced, because certain carriers require owner-operators to bear a portion of the public-liability and property-damage insurance, and, in some instances, to assume part of the responsibility for cargo insurance and pay a portion of each loss and damage claim.

However, the Commission's comment concerned carriers (lessees) that disclaim their responsibility for damage to the public. Such a disclaimer denegrates the lessee's control and responsibility. The Commission's comment did not discuss carriers which, while acknowledging their liability, arrange to shift the ultimate loss to the lessor.

a lessee has in fact assumed the requisite control and responsibility.[4] In two Commission cases in which the lessor's insurance policy provided that the lessor would hold the lessee free from liability, the Commission held that the "control and responsibility" requirements of the regulations were not satisfied. *Tanksley Transfer Company Extension—Points in Four States*, 110 M.C.C. 674; *Diamond Transportation System, Inc., Extension — Wisconsin and Oklahoma Origins*, 117 M.C.C. 706. However, those cases involved a number of other factors tending to show a lack of control by the lessee. The Commission in each case based its conclusion upon the cumulative impact of all of these factors and not upon the indemnification provisions alone.

4. The United States believes that the present Commission regulations with respect to leased equipment have not adequately assured the safe operation of leased vehicles. The Bureau of Motor Carrier Safety, which is responsible for ensuring compliance with safety regulations,[5] has difficulty in obtaining compliance by owner-operators who lease equipment to certificated carriers.

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[4]The clauses involved in this case provide for indemnification only of damage proximately caused by the negligence of a driver provided by the lessor or by defects in the lessor's equipment. On the other hand, a clause providing for indemnity for harm caused by conditions created by the lessee, or by conditions that the lessee should have detected and cured in the course of adhering to the Commission's inspection regulations, might by itself show that the lessee has failed to assume the requisite control and responsibility.

[5]The Commission's duties relating to motor carrier safety were transferred to the Department of Transportation under Section 6(e) of the Department of Transportation Act, 49 U.S.C. 1655(e), and have been delegated to the Bureau of Motor Carrier Safety of the Federal Highway Administration, 49 C.F.R. 1.48, 389.4. However, the Commission retains authority to promulgate rules with respect to the terms of equipment leases pursuant to 49 U.S.C. 304(e).

The United States believes that appropriately drafted regulation of indemnification clauses would be desirable as a matter of policy and that the Commission has power to adopt such regulations under 49 U.S.C. 304(e). Such regulation might provide regulated carriers with a greater economic incentive to refuse to lease unsafe equipment or to implement preventive maintenance programs; as a consequence owner-operators would have a greater incentive to perform adequate maintenance in order to obtain leases. However, the United States believes that the present Commission rules cannot appropriately be interpreted as prohibiting lease provisions which require the lessor to indemnify the lessee for liability claims from members of the general public.

The Commission has never formally considered the effects an indemnity clause might have either on the care with which leased equipment is operated or on the dispatch with which injury and damage claims are paid. However, in promulgating the leased-equipment regulations the Commission expressly adopted other measures, including the inspection requirement, for the purpose of ensuring that leased equipment would be operated safely.

CONCLUSION

For the reasons stated the petitions for writs of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1975.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-54

SANDRA WEAR,

vs.

BRADA MILLER FREIGHT SYSTEMS, INC.,
Respondent,

and

TRANSAMERICAN FREIGHT LINES, INC.,
Petitioner.

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari

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and

TRANSAMERICAN FREIGHT LINES, INC.,
Petitioner.

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari

Respondent Brada Miller Freight Systems, Inc. (Brada Miller) hereby files its brief in opposition to Transamerican Freight Lines, Inc.'s (Transamerican) Petition for a Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit entered May 6, 1974.

STATEMENT OF THE CASE

The facts as set out in Transamerican's Statement of the Case are generally accurate except that Respondent denies that Hardrick was its employee. In addition, the Lease Agreement referred to therein contains the following provisions:

Paragraph 3:

> "Second party (Brada) further agrees that it will bear the entire cost of operating said motor vehicle equipment, and that it will at all times keep said motor vehicle equipment in good mechanical condition, order and repair, and will cause said motor vehicle equipment to be operated only by a competent employee of the second party, in which event said employee of the second party shall be the representative of the second party in the premises. It being expressly understood and agreed that nothing herein is to be construed as constituting second party, its agents, servants and employees, as the agent, servant and employee or representative of the first party."

Paragraph 5:

> "Second party further agrees that in the operation of said motor vehicle equipment it will comply with all the rules and regulations of the Bureau of Motor Carriers of the Interstate Commerce Commission, and the applicable rules and regulations of any public utility commission and of any other similar state authority; that it will observe all pertinent rules and regulations governing the hours of service of its drivers or helpers, and all regulations, laws and ordinances of any government authority applying to the operation upon the public highways of said motor vehicle equipment, that it will pay any and all federal or state withholding taxes, assessments, unemployment insur-

> ance, old age insurance, or other social security payments that may become due by reason of the payment of wages or other earnings to the driver of said motor vehicle equipment, or to any helper, or to any person or persons engaged in the carrying out of this Agreement upon the part of second party, and further agrees to meet all laws or regulations now or hereafter adopted or promulgated by legally constituted authorities in respect thereto."

ARGUMENT

Transamerican seeks to bring itself within the rule of *Allstate Insurance Company v. Alterman Transport Lines, Inc.* (5th Circ. 1972), 465 F.2d 710, which is in conflict with decisions of the Seventh Circuit in *Alford v. Major* (7th Circ. 1972), 470 F.2d 132, and the present case, *Sandra Wear v. Transamerican Freight Lines, Inc., and Brada Miller Freight Systems, Inc.*, number 73-1773, not yet reported.

It is submitted, however, that under the facts in this case, Transamerican does not fall within the rule announced in *Allstate*. Although Transamerican did exercise complete control over the driver and the tractor, the lease agreement under which Transamerican seeks indemnity from Brada Miller is in violation of Interstate Commerce Commission Regulations.

Under Paragraph 3 of the Lease Agreement, Brada Miller, during the period of the trip lease, is required to keep the equipment in good order and repair, a duty that the I.C.C. puts squarely on Transamerican. Paragraph 5 requires Brada Miller "in the operation of said motor vehicle equipment" to comply with various rules and regulations including rules "governing the hours of service of its drivers or helpers" and regulations "applying to the operation upon the public highways of said motor vehicle equipment". Brada Miller also must pay taxes, etc. on behalf of the driver and "any persons engaged in the carrying out of this agreement on the part of (Brada Miller)". If absolute control is in Transamerican, how can Brada Miller do these things. Obviously it cannot. The lease therefore violates the I.C.C. regulations in that it places on Brada Miller, duties and responsibilities which the I.C.C. places on Transamerican..

In attempting to bring itself under the rule announced in *Allstate*, Transamerican must show not only that it did in fact

exercise control over the driver and the tractor, but also that its Lease Agreement under which it seeks indemnity from Brada Miller complied with the I.C.C. regulations. This it cannot do.

CONCLUSION

Although a conflict does exist between the decisions of the various Courts of Appeals on the question of the validity of indemnity provisions of trip lease agreements, Transamerican's trip lease agreement violates I.C.C. regulations and Transamerican does not fall within the rule announced in the Allstate case. Transamerican's Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted

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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

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Respondents.

PETITIONER'S REPLY BRIEF

In Support of Its Petition for a Writ of Certiorari

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BRADA MILLER FREIGHT SYSTEMS, INC., et al.,
Respondents.

PETITIONER'S REPLY BRIEF

In Support of Its Petition for a Writ of Certiorari

In the Petition for a Writ of Certiorari which has been filed herein, every effort was made to demonstrate the reasons for which it is felt the petition should be granted. Likewise, every effort was made to avoid offering an additional burden to this Court by submitting argument in the petition on the ultimate merits of the case. Petitioner's brief on the merits will hopefully be presented at the appropriate time.

Respondent's Brief in Opposition to the Petition for Writ of Certiorari contains arguments relating to the merits which un-

fortunately require explanation at this point in order that they not be misleading.

First, in the paragraph at the top of page two of its brief, respondent states that it denies that Hardrick was respondent's employee. Evidence in the record in this case is abundant to demonstrate that in fact Hardrick was respondent Brada's employee; however, whether or not this was a fact is immaterial to the issues in the present posture of this case. Brada's motion for summary judgment stated, "That the pleadings, depositions, answers to interrogatories and exhibits on file show that the indemnity provision of the trip lease, set out in paragraph 3 of Amended Crossclaim of Defendant Transamerican Freight Lines, Inc. is contrary to public policy and is unenforceable." This was the issue presented to the Courts below.[1] Brada's position has been that this issue was determinative of the case regardless of the other facts. This position has been supported by the decisions of the District Court and the United States Court of Appeals for the Seventh Circuit in which decisions, for purposes of the issue involved, it was assumed that Hardrick was Brada's employee.

If the fact of Hardrick's employment by Brada had been both disputed and material to the issue involved, this case would never have reached summary judgment since those circumstances would have required a trial.

For Brada to raise a question at this time as to Hardrick's employment injects a false and confusing issue into the case. The true issue involved here is stated in the "Question Presented for Review" which appears on page three of the Petition for a Writ of Certiorari.

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[1] *Wear v. Brada Miller Freight Systems, Inc. et al.*, District Court 1973, Not Yet Reported, Appendix A to Petition for a Writ of Certiorari; *Wear v. Brada Miller Freight Systems, Inc. et al.*, 7th Circ. 1974, Not Yet Reported, Appendix B to Petition for a Writ of Certiorari.

Secondly, under the argument portion of its brief respondent states that the facts of this case do not fall within the rule announced in *Allstate Insurance Company v. Alterman Transport Lines, Inc.*, 5th Circ. 1972, 465 F. 2nd 710, Appendix C to Petition for a Writ of Certiorari. In an apparent effort to support this statement respondent then refers to certain clauses in the lease agreement regarding the maintenance of the equipment, compliance with government regulations and payment of taxes. Respondent infers that these clauses distinguish the case at bar from the *Allstate* case and that of *Carolina Freight Carriers Corporation v. Pitt County Transportation Company*, 4th Circ. 1974, 492 F. 2nd 243, Appendix D to Petition for a Writ of Certiorari. An examination of the opinions in the *Allstate* and *Carolina Freight Carriers* cases reveals that this maintenance of equipment clause was also in *Allstate* while all of the clauses to which Brada refers appear in the *Carolina Freight Carriers* case. Therefore, the distinction which Brada attempts to make, does not exist. The decision of the Seventh Circuit in the present case construes the facts as being similar to those in the *Allstate* case.

It is again respectfully submitted that because of the reasons set forth in the Petition for a Writ of Certiorari, none of which have been challenged in Respondent's Brief, the Petition should be granted.

Respectfully submitted

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BRADA MILLER FREIGHT SYSTEMS, INC., et al.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONER ON THE MERITS

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONER ON THE MERITS

OPINIONS BELOW

The Opinion of the District Court for the Southern District of Illinois, Southern Division, in *Sandra Wear v. Brada Miller Freight Systems, Inc., and Transamerican Freight Lines, Inc.*, Civil Action Number 4289, is not reported. A true copy of the same and of the Order of that Court entered in conjunction with its Opinion are contained in the Appendix to the Petition for a Writ of Certiorari in this case commencing on page A-1.

The Opinion of the United States Court of Appeals for the Seventh Circuit in *Sandra Wear v. Transamerican Freight Lines,*

Inc., Defendant-Appellant and Brada Miller Freight Systems, Inc., Defendant-Appellee, Number 73-1773, is not reported (decision at 497 F2d 926). A true copy of that Opinion is contained in the Appendix to the Petition for a Writ of Certiorari in this case commencing on page A-6.

JURISDICTION

Transamerican Freight Lines, Inc., appealed this case to the United States Court of Appeals for the Seventh Circuit from an Order of the District Court granting a Motion for Summary Judgment to Brada Miller Freight Systems, Inc., on Transamerican's Cross-Claim against Brada. The decision of the Court of Appeals affirmed the Order of the District Court granting summary judgment. The United States Court of Appeals for the Seventh Circuit entered its decision in the case of *Sandra Wear v. Brada Miller Freight Systems, Inc., et al.*, 497 F2d 926, on May 6, 1974. The Petition for a Writ of Certiorari in this case was filed on August 2, 1974, which was within ninety days of the entry of such judgment pursuant to 28 U.S.C. Section 2101 (c).

The jurisdiction of this Court to review the judgment and decision in this case by writ of certiorai is conferred by 28 U.S.C. Section 1254 (1).

STATUTES AND REGULATIONS INVOLVED

Statutes:

Interstate Commerce Act:

Section 304(e), 49 U.S.C. Section 304(e):

(e) Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, con-

tracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

Vol. 10, United States Code (1970 ed.), pp. 11942.

Regulations:

Interstate Commerce Commission Regulations:

Section 1057.3(a), 49 C.F.R. Section 1057.3(a):

The provisions of Section 1057.4, except paragraphs (c) and (d), relative to inspection and identification of equipment, shall not apply:

(a) *Equipment used in the direction of a point which lessor is authorized to serve.* To equipment owned or held under a lease of 30 days or more by an authorized carrier and regularly used by it in the service authorized, and leased by it to another authorized carrier for transportation in the direction of a point which lessor is authorized to serve: *Provided*, That the two carriers have first agreed in writing that control and responsibility for the operation of the equipment shall be that of the lessee from the time the equipment passes the inspection required to be made by lessee or its representative under Section 1057.4(c) until such time as the lessor or its representative shall give to the lessee or its representative a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is retaken or until such time as the required inspection is completed by another authorized carrier taking possession of the equipment in an interchange of equipment where such use is contemplated, such writing to be signed by the parties or their duly authorized regular employees or agents, and a copy thereof carried in the equipment while the equipment is in the possession of the lessee.

Title 49, Code of Federal Regulations, Chapter 10, Part 1057, Volume effective 10-1-73, Published by Office of Federal Register, G.S.A. p. 138.

Section 1057.4(a)(4), 49 C.F.R. Section 1057.4 (a)(4):

Other than equipment exchanged between motor common carriers in interchange service as defined in Section 1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) *Contract requirements.* The contract, lease, or other agreement for the use of such equipment:

(4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except: (exceptions not pertinent.)

Title 49, Code of Federal Regulations, Chapter 10, Part 1057, Volume effective 10-1-73, Published by Office of Federal Register, G.S.A. pp. 138 and 139.

QUESTIONS PRESENTED FOR REVIEW

In a case involving an agreement between two motor carriers for the lease of a tractor and trailer from one carrier to the other for a single trip, where the lease complies with the I.C.C. regulations and where the lessee assumes control and responsibility for the tractor and trailer involved according to I.C.C. regulations, is an indemnity clause in this otherwise valid lease invalid as against public policy and in circumvention of the I.C.C. regulations, or is this indemnity clause a valid exercise of the right of the parties to freedom of contract.

STATEMENT OF THE CASE

This case was originally instituted by Sandra Wear to recover damages for injuries she received in a truck-car collision on January 22, 1968. She filed her action against Brada Miller Freight Systems, Inc. (hereafter Brada), and Transamerican Freight Lines, Inc. (hereafter Transamerican), which defendants then cross-claimed against each other. Ultimately plaintiff dismissed her case against Brada and proceeded to trial against Transamerican during the course of which trial plaintiff and Transamerican effectuated a settlement of plaintiff's case. Thereafter Transamerican amended its cross-claim against Brada to

plead the settlement and by the cross-claim sought recovery from Brada of the amount of the settlement plus expenses by virtue of an indemnification clause in a truck lease agreement between Brada (lessor) and Transamerican (lessee) (A. 4-8).

For our purposes, the story starts January 19, 1968, at which time a lease agreement was entered into by which Brada leased a tractor and trailer to Transamerican for a single trip from Detroit, Michigan to Kansas City, Missouri. It was represented by Brada in the lease that this was a trip in the direction of a point which Brada was authorized to serve. Additionally, the lease provided that Transamerican, during the term of the lease, should have control and responsibility for the operation of the leased equipment. The vehicle was operated during the term of the lease by Howard Hardrick, a full-time driver and employee of Brada. Hardrick was furnished by Brada to Transamerican for the term of the lease although continuing as Brada's employee. (See Lease Agreement between the parties, A. 16, Exhibit 3 to Affidavit of Donavon F. Rayl and A. 89, Exhibit 1 to Deposition of Ronald Temperley. The terms of this lease agreement are set forth in full as an appendix to this brief, omitting only descriptive material and signatures.)

During the course of the trip which is the subject of this lease agreement, there was a collision near Smithboro, Illinois between the equipment covered by the lease and an automobile operated by Sandra Wear. Thereafter Sandra Wear filed her law suit claiming damages for injuries which she alleged resulted from the negligence of the driver of the leased tractor-trailer unit (A. 5, 6).

Paragraph 4 of the lease agreement stated "It is mutually understood and agreed, that (Transamercian) during the term of this lease shall have the control and responsibility for the operation of said equipment in respect to the public, shippers and Interstate Commerce Commission for such period that said

equipment is operated under the terms of this lease as provided in paragraph 1 hereof." (A. 16, 89 and Appendix to Petitioner's Brief A. 3).

Transamerican had the equipment involved inspected before the trip in question and completed the vehicle inspection report required by the I.C.C. (A. 66-67, Temperley Deposition Exhibit 2, A. 89). The driver, Hardrick, furnished Transamerican with driver's daily logs required by I.C.C. regulations which showed Transamerican as the carrier (A. 68-73, Temperley Deposition Exhibit 4-7, A. 89). The accident in question was reported to Transamerican (A. 73, Temperley Deposition Exhibit 8, A. 89). The driver, Hardrick, was instructed to follow certificated routes only and was supplied with a copy of Transamerican's I.C.C. authority showing these routes. Transamerican advanced money to the driver to cover his expenses for fuel, lodging, food and emergencies (A. 81-82, Temperley Deposition Exhibit 10, A. 89).

At the time of the accident the leased equipment was being operated from Detroit to Kansas City under authority granted Transamerican by the I.C.C. and during the trip there was a placard affixed to the side of the tractor stating "Operated by Transamerican Freight Lines, Detroit, Michigan" and showing Transamerican's I.C.C. number (A. 55-58, 63). Transamerican reported the accident to the I.C.C. on the appropriate I.C.C. form (A. 94-96).

Transamerican, in fact, paid the sum of $80,000.00 to settle the claim of the injured Sandra Wear (A. 7).

Paragraph 9 of the lease agreement provides "It is mutually understood and agreed by and between the parties hereto that (Transamerican) shall not be responsible to (Brada), its agents, servants and employees, for any negligence of (Brada), its agents, servants or employees, or for any loss, damage, injury or expense arising out of the failure of (Brada) to carry out the terms

of this Agreement. (Brada) hereby agrees to indemnify and save harmless (Transamerican) from any and all claims, suits, losses, fines or other expenses arising out of, based upon or incurred because of injury to any person or persons, or damage to property sustained or which may be alleged to have been sustained by reason of any negligence or alleged negligence on the part of (Brada), its agents, servants or employees, and for any loss or damage to cargo resulting from any negligence or unlawful act of (Brada), his agents, servants and employees. It is mutually understood and agreed that (Brada) will defend, at his own expense and cost, any and all suits that may be brought against (Transamerican) for injuries sustained, including death resulting therefrom, or damage to property caused or alleged to have been caused by the negligence of any person employed by (Brada), while engaged in the performance of any of the work required by the terms and conditions of this Agreement, and for any cargo loss sustained from any negligence or unlawful act on the part of (Brada), his agents, servants and employees. Nothing in this paragraph 9 contained shall be construed to in anywise limit the liability of (Transamerican) to the public in connection with the use of said equipment under this Agreement." (A. 5, Appendix to Petitioner's Brief, A. 5-6).

Paragraph 3 of the lease agreement provides that the equipment which is the subject of the lease is to be operated only by an employee of Brada (A. 16, 96, Appendix to Petitioner's Brief A. 3).

As stated, this case has reached its present posture following the decision of Brada's Motion for Summary Judgment. There are certain underlying factual disputes between the parties which will ultimately require a trial on the merits; however, the only issue in Brada's motion is the claim that the indemnity provision in the lease agreement is contrary to public policy. For the consideration of this issue, the relevant facts necessary to this decision are undisputed (A. 90-97).

SUMMARY OF ARGUMENT

A lease agreement has been entered into whereby Brada as lessor has leased tractor and trailer to Transamerican for a trip from Detroit, Michigan to Kansas City, Missouri with the equipment to be operated by a driver who was Brada's employee. Regulations of the Interstate Commerce Commission provide that the parties to such a lease must agree "in writing that control and responsibility for the operation of the equipment shall be that of the lessee * * *". (49 C.F.R. 1057.3 (a)). The terms of the lease agreement between Transamerican and Brada conform to the provisions of the I.C.C. regulations. The actual procedures followed by Transamerican in carrying out the terms of the lease conform to the provisions of the I.C.C. regulations. Included in the provisions of the lease agreement is a clause which provides that the lessor, Brada, will indemnify the lessee, Transamerican, from losses arising from negligence of the lessor or its employees (the lease provides that the driver is an employee of the lessor).

The I.C.C. regulations make no reference to indemnify agreements between lessor and lessee and therefore do not specifically prohibit such agreements. The control and responsibility requirements of the regulations have been fully met in this case both in law and in fact. There is no contention of any violation by Transamerican of any of the provisions of the regulations.

It is Transamerican's position that under the facts and circumstances set forth here the indemnity clause in the lease agreement does not in and of itself circumvent or contravene the intent or pourpose of the control and responsibility provisions of the regulations and is not against public policy. To the contrary, public policy supports the right of parties to freely contract between themselves as to such matters.

ARGUMENT

The United States Court of Appeals for the Seventh Circuit in deciding the present case, has ruled that even where there was otherwise complete compliance by the lessee Transamerican with the regulations of the Interstate Commerce Commission, "the indemnity clause itself circumvents the regulations". (See Appendix to Petition for a Writ of Certiorari pp. A-12) This decision is contrary to decisions of the United States Courts of Appeals for the Fourth, Fifth and Sixth Circuits on the same subject and in fact is contrary to the belief of the Commission itself as to the meaning and intent of its regulations. (See *Carolina Freight Carriers Corporation v. Pitt County Transportation Company*, (4th Circ. 1974), 492 F.2d 243, Petition for a Writ of Certiorari pending in this Court, No. 73-1750; *Allstate Insurance Company v. Alterman Transport Lines, Inc.*, (5th Circ. 1972), 465 F.2d 710; *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, (6th Circ. 1974), 507 F.2d 100, Petition for a Writ of Certiorari pending in this Court, No. 74-973; Memorandum for the United States and the Interstate Commerce Commission as Amici Curiae filed in the present case, point No. 3, pages 5 and 6).

Regulations

The lease in our present case was between two authorized carriers as described by Section 1057.3(a) of the Interstate Commerce Commission Regulations. This section states in part that the carriers who are parties to the lease of equipment must agree "in writing that control and responsibility for the operation of the equipment shall be that of the lessee * * *". 49 C.F.R. 1057.3(a). Certain other types of equipment leases which involve the same issues are required by the Commission Regulations to provide for "the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee * * *". 49 C.F.R. 1057.4 (a)(4).[1]

Additional provisions of the regulations applicable to our present lease are found in 49 C.F.R. 1057.4(c) and (d). These sections require detailed safety inspection of the equipment by the lessee and identification of the equipment during the term of the lease as being operated by the lessee. The language of these provisions is not relevant to the issues of this case and it is conceded that Transamerican fully performed its duties under each of these regulations.

Transamerican Compliance With Regulations

Paragraph 4 of the Lease Agreement in this case does provide that control and responsibility for the operation of the equipment shall be with Transamerican.

The facts set forth in the Statement portion of this brief and contained in the Opinion of the Seventh Circuit show that Transamerican in fact exercised actual control. The control by Transamerican is conceded by Brada. The facts of the present litigation are irrefutable testimony as to the responsibility element since these facts show that the injured third party has long ago been paid for her injuries *by Transamerican*. Transamerican's responsibility as well is conceded by Brada.

It is clear that the lease in this case was no sham. It was not an attempt to lease operating authority in the guise of a lease of equipment.

---

[1] "Possibly subject to some qualifications, it may be stated that when a certificate or permit holder furnishes service in vehicles owned and operated by others, he must control the service, to the same extent as if he owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the shipper, the public and the Commission for the transportation." Ex Parte No. MC-43, 51 M.C.C. 461 lc 466.

Indemnity Invalid Where Lease Not Compliance With Regulations

The Seventh Circuit had decided a case involving an indemnity clause contained in a lease agreement of transportation equipment prior to its decision in our present case. In the case of *Alford v. Major* (7th Circ. 1972), 470 F.2d 132, the indemnity clause was also held invalid. From the opinion in that case, it appeared that the lessor retained control of the operation of the equipment contrary to the requirements of the I.C.C. regulations.

We do not defend a lease which, by its terms or in fact violates the provisions or the purpose of the Commission's regulations as appeared in the *Alford* case.

Indemnity Valid Where Lease Is Compliance With Regulations

In each of the cases previously cited in this Argument, *Carolina Freight Carriers, supra; Allstate, supra;* and *Jones Trucking Company, supra,* the courts were faced with leases of trucking equipment which complied with the letter and spirit of the I.C.C. regulations. In each of these cases the validity of an indemnity agreement was upheld and each of these courts distinguished the *Alford* case *supra,* because the Alford opinion demonstrated a failure to comply with the control requirements of the regulations.

The decision of the Fifth Circuit in the *Allstate* case states "* * * we find nothing in the language of 49 C.F.R. Section 1057.4 (a)(4) which would prohibit two freely contracting parties from determining, as between themselves, which party will ultimately bear the cost of damages done to a third person. The only conceivable argument against such an arrangement would be that the regulation seeks to prevent indemnification

on the theory that a trucking company, knowing it does not have to pay damages, might tend to be less careful in supervising and controlling the actions of its truck drivers. However, the same can be said of insurance coverage which the regulations obviously do not prohibit. We are of the opinion that had the I.C.C. intended to prevent indemnification between trucking companies it would have said so in precise terms." *Allstate v. Alterman,* 465 F.2d lc 713.

The Fourth Circuit in the *Carolina Freight Carriers* case stated "Nor do we find the indemnification provision violative of either the spirit or letter of the I.C.C. regulation." 492 F.2d lc 246.

Freedom of Contract

The same distinction of the *Alford* case has recently been made by Judge Austin of the United States District Court for the Northern District of Illinois, Eastern Division in *General Express, Inc. v. Schreiber Freight Lines, Inc.,* 377 F.Supp. 1159. In considering the rights of the parties to contract between themselves it was stated:

> "Any lingering doubt created by Schreiber's public policy argument is dispelled by the public policy of fostering freedom of contract. In *Baltimore and Ohio Southwestern Railway Company v. Voigt,* 176 U.S. 498, 20 S.Ct. 385, 44 L.Ed. 560 (1900), the court said it must not be forgotten that,
>
> > 'The right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligations on the pretext of public policy, unless it clearly appears

that they clearly (sic) contravene public right or public welfare.' "

General Express, Inc. v. Schreiber Freight Lines, Inc., 377 F.Supp. lc 1161.

The *General Express* Opinion also equates our present situation with that in the case of *Chicago, R.I. & P.R. Co. v. Chicago, B. & Q. R. Co.* (7th Circ. 1971), 437 F.2d 6, which was an action between two railroads on an indemnity agreement and where it was stated:

"The distribution of risks undertaken by this contract does not impair the policies or force of the Federal Safety Appliance Act * * * These provisions of the contract represented an adjustment of the private relations between the two carriers but did not alter their duties to the public as common carriers." 437 F.2d at 9-10.

The reference in the *General Express* case to the prior decision of this court in *Baltimore Ohio Southwestern Railway Company v. Voigt*, 176 U.S. 498 is equally appropriate in our present case. The right of the parties to freely contract between themselves as they see fit is not to be taken lightly. Contractual provisions should not be invalidated "* * * unless it *clearly appears* that they contravene public right or the public welfare." 176 U.S. lc 505. [Emphasis added]

Internalize Costs?

In its opinion in our present case, the Seventh Circuit has rejected the distinctions which have been made of the *Alford* case and holds that the indemnity provision itself is invalid regardless of other compliance with the regulations. The Seventh Circuit states that the I.C.C. regulations require the party who has the duty of responsibility and control to internalize the costs

of a breach of this duty.[2] There is no elaboration by the court as to how it reached this conclusion and we submit that this statement by the Court finds no basis in the regulations. The Seventh Circuit states that the insurance rates would reflect the level of care exercised. It is equally true that over a period of time, in a competitive market this would also be reflected in the rental rates for leased equipment. Additionally, we submit that a contractual adjustment of losses between the parties provides additional incentive for each party to be more conscious of safety. Also, as has been pointed out in other cases, the indemnity agreement provides added sources of funds to the public should damage occur.

Therefore, as stated, we find no basis in the regulations for the statement of the Seventh Circuit as to internalization of costs. We also find no factual basis for this statement.

History of Regulations

The history of the regulations involved in this case is set forth in *American Trucking Associations v. United States*, 344 U.S. 298 (1953), and in the reports of Ex Parte Number MC-43. See 51 M.C.C. 461; 52 M.C.C. 675; 64 M.C.C. 361; 68 M.C.C. 553. These reports show the lengthy extent to which the Commission explored the problems involved in leasing of equipment in the trucking industry. Comprehensive regulations were prepared in order to correct that which it was felt by the Commission needed correcting. It is significant that there is no language in these regulations prohibiting indemnity agreements in these equipment leases. It is also significant to note that these regulations were formulated and became effective more than twenty years ago. Although there have been some

[2] We assume that the breach of duty referred to by the court is the negligent tort committed against a third party rather than the duty of responsibility and control.

amendments and although there have been numerous incidences of cases before the courts throughout this period, the Commission has not seen fit to make any amendment or additions to the regulations in order to prohibit or limit indemnity agreements.

Interpretation of Regulations by Commission and United States

In the Memorandum for the United States and the Interstate Commerce Commission as Amici Curiae filed in this case the position of the Commission on this subject is clearly revealed. It is there stated, "If the lessee otherwise assumes full control and acknowledges its personal liability to the injured party, it is not forbidden to seek indemnity from the lessor. The goal underlying the regulations—the prevention of leases of operating authority in the guise of leases of equipment—is not affected by indemnification agreements where other adequate indicia of control and responsibility are present.

"The Commission believes, however, that an indemnity clause is a factor to be considered in determining whether a lessee has in fact assumed the requisite control and responsibility." (Memorandum point 3, pp. 5)

Thus we see that the opinions in the *Carolina Carriers, Allstate* and *Jones Trucking* cases *supra* are all in accord with the position taken by the Commission on the interpretation of its regulations. It is clear that the position taken by the Commission would uphold the validity of the indemnity agreement in our present case.

The interpretation by an administrative agency of its own regulations has constantly been accorded great deference by this Court. In *Bowles v. Seminole Rock & Sand Company*, 325

U.S. 410 (1945), Bowles, the administrator of the office of Price Administration, sued a company to enforce the agency's maximum price regulations. This Court stated:

> "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U.S. lc 413-414.

The same principle has recently been followed by the Second Circuit Court of Appeals in *Perine v. William Norton & Company, Inc.* (2nd Circ. 1974), 509 F.2d 114, where the court relied on an amicus brief filed by the Securities and Exchange Commission for interpretation of an SEC regulation. The *Bowles* case, *supra*, was authority for that decision.

It can also be seen from the Memorandum for the United States and the Interstate Commerce Commission as Amici Curiae filed in this case that the United States concurs in the belief that the regulations of the Interstate Commerce Commission do not prohibit an indemnity clause of the type under consideration in this case. (Memorandum p. 7).

Transamerican, the lessee in this case, has complied with the I.C.C. regulations, has appropriately assumed and exercised control and responsibility for the equipment, has carried out the safety requirements and has satisfied the liability to the injured third party. This being the case, there is nothing contained in the indemnity provisions of the lease which conflicts with the requirements or purpose of the Regulations and these provisions are a valid exercise of the rights of the parties to contract with each other.

CONCLUSION

For the reasons stated above, the decisions of the District Court and of the United States Court of Appeals for the Seventh Circuit granting summary jugdment to Brada should be reversed and this case should be remanded to the District Court for a trial on the issues stated in Transamerican's Amended Cross-Claim and Brada's Answer.

Respectfully submitted

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APPENDIX

APPENDIX

TRANSAMERICAN FREIGHT LINES, INC.
Detroit, Michigan

Lease Agreement With Authorized Carriers

THIS AGREEMENT, made and entered into this 19th day of January, A.D. 1968, by and between TRANSAMERICAN FREIGHT LINES, INC., a Delaware Corporation, hereafter referred to as the First Party lessee, and Brada Miller Freight Systems, Inc. whose address is 3120 Lonya Ave. of the City of Detroit, State of Michigan hereafter referred to as the Second Party, lessor.

WITNESSETH: WHEREAS, First and Second Parties are authorized carriers as that term is defined in the rules and regulations of the Interstate Commerce Commission pertaining to the lease and interchange of vehicles by motor carriers; and

WHEREAS, the Second Party is the owner or holds under a lease for more than thirty (30) days, certain motor vehicle equipment regularly used by it which it desires to lease to the First Party for its use as hereinafter specified.

NOW, THEREFORE, in consideration of the compensation to be paid by First Party to Second Party and their mutual promises, agreements and conditions herein contained, it is hereby agreed as shows:

1. The Second Party hereby leases to the First Party the following motor vehicle equipment to be operated by H. L. Hardrick, a driver who is duly authorized by the Second Party to execute this Agreement on its behalf, for the movement in interstate commerce for the duration of one (1) single trip be-

ginning at ..... A.M. as 1:00 P.M. on Jan. 19, 1968, of such freight which First Party shall turn over to Second Party and the Second Party agrees to transport such freight from the place or places where Second Party may receive the same in the City of Detroit, State of Michigan direct to without deviation from authorized routes of the First Party to its terminal in the City of Kansas City, State of Missouri which latter city Second Party represents is in the direction of a point which it is authorized to serve.

(Descriptive Material Omitted in Printing)

2. First Party agrees to pay Second Party and Second Party agrees to accept therefor the following compensation:

(Descriptive Material Omitted in Printing)

3. Second Party further agrees that it will bear the entire cost of operating said motor vehicle equipment, and that it will at all times keep said motor vehicle equipment in good mechanical condition, order and repair, and will cause said motor vehicle equipment to be operated only by a competent employee of the Second Party, in which event said employee of the Second Party shall be the representative of the Second Party in the premises. It is being expressly understood and agreed that nothing herein is to be construed as constituting Second Party, its agents, servants and employees, as the agent, servant, employee or representative of the First Party.

4. It is mutually understood and agreed, that the First Party during the term of this lease shall have the control and responsibility for the operation of said equipment in respect to the public, shippers and Interstate Commerce Commission for such period that said equipment is operated under the terms of this lease as provided in Paragraph 1 hereof.

5. Second Party further agrees that in the operation of said motor vehicle equipment it will comply with all the rules and

regulations of the Bureau of Motor Carriers of the Interstate Commerce Commission, and the applicable rules and regulations of any public utility commission and of any other similar state authority: that it will observe all pertinent rules and regulations governing the hours of service of its drivers of [*sic*] helpers, and all regulations, laws and ordinances of any government authority applying to the operation upon the public highways of said motor vehicle equipment, that it will pay any and all federal or state withholding taxes, assessments, unemployment insurance, old age insurance, or other social security payments that may become due by reason of the payment of wages or other earnings to the driver of said motor vechile [*sic*] equipment, or to any helper, or to any person or persons engaged in the carrying out of this Agreement upon the part of Second Party: and further agrees to meet all laws or regulations now or hereafter adopted or premulgated [*sic*] by legally constituted authorities in respect thereto.

6. It is mutually agreed that responsibility of First Party resulting from control and use of said equipment pursuant to Paragraph 4 shall in no way abrogate the rights of the First Party to demand set off and endemnity [*sic*] from the Second Party as set out in Paragraph 9 hereof.

7. It is further agreed that Second Party represents that its employee, agent or servant executing this agreement has full authority to act on its behalf and represents that said person is competent and qualified to perform the vehicle inspection required by the Interstate Commerce Commission regulations.

8. Second Party further agrees to procure and maintain at its own expense adequate fire, theft and collision insurance with respect to the aforesaid motor vehicle equipment and to indemnify and save the First Party harmless from any and all loss, damage or expense arising out of fire, theft, collision, accident or other casualty or event affecting such equipment. In

the event the Second Party or any driver designated by Second Party shall operate said motor vehicle equipment and during the operation thereof shall be pulling a trailer belonging to or leased by the First Party, and said trailer shall be damaged or lost because of the fault or negligence of the Second Party or the driver designated by said Second Party, the Second Party agrees to pay First Party for said loss or damage to said trailer. The Second Party further agrees to indemnify and to hold the First Party harmless from all loss and damage to property belonging to or leased by the First Party and from all losses and claims for damage to cargo that shall be occasioned or caused by the negligence or fault of the Second Party or the driver or operator of said equipment designated by the Second Party.

9. It is mutually understood and agreed by and between the parties hereto that First Party shall not be responsible to Second Party, its agents, servants and employees, for any negligence of the Second Party, its agents, servants or employees, or for any loss, damage, injury or expense arising out of the failure of Second Party to carry out the terms of this Agreement. Second Party hereby agrees to indemnify and save harmless First Party from any and all claims, suits, losses, fines or other expenses arising out of, based upon or incurred because of injury to any person or persons, or damage to property sustained or which may be alleged to have been sustained by reason of any negligence or alleged negligence on the part of Second Party, its agents, servants or employees, and for any loss or damage to cargo resulting form [*sic*] any negligence or unlawful act of Second Party, his agents, servants and employees. It is mutually understood and agreed that Second Party will defend, at his own expense and cost, any and all suits that may be brought against First Party for injuries sustained, including death resulting therefrom, or damage to property caused or alleged to have been caused by the negligence of any person employed by Second Party, while engaged in the performance of

any of the work required by the terms and conditions of this Agreement, and for any cargo loss sustained resulting from any negligence or unlawful act on the part of Second Party, his agents, servants and employees. Nothing in this Paragraph 9 contained shall be construed to in anywise limit the liability of the Party of the First Part to the public in connection with the use of said equipment under this Agreement.

10. It is mutually understood and agreed that upon the termination of this Agreement, the Second Party will forthwith remove from said motor vehicle equipment all plates, signs or other evidence of certificate numbers or permits belonging to First Party, and deliver the same to said First Party, together with any other property of First Party that may be then in the possession of Second Party, including collections and C.O.D. charges.

11. First Party has caused an inspection to be made of the aforesaid motor vehicle equipment, the results of which have been certified upon the report attached to a copy of this lease, which discloses that the same is equipped with all parts and accessories necessary for its safe operation in accordance with the Safety Regulations of the Interstate Commerce Commission.

12. The First Party, by signing this Agreement acknowledges receipt of the motor vehicle equipment specifically described in Paragraph 1 above on the date and at the time therein set forth.

In Witness Whereof, the parties hereto have caused this Agreement to be duly executed in quadruplicate on the date set forth below.

(Signatures Omitted in Printing)

No. 74-54

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

TRANSAMERICAN FREIGHT LINES, INC.,
Petitioner,

v.

BRADA MILLER FREIGHT SYSTEMS, INC., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT ON THE MERITS

QUESTION PRESENTED FOR REVIEW

Whether an indemnification agreement in a trip lease entered into between two carriers operating in interstate commerce whereby the lessor agrees to indemnify the lessee for losses caused through the operation of equipment is in violation of Interstate Commerce Commission Regulations CFR 49 § 1057 and is therefore contrary to public policy and not enforceable.

STATEMENT OF THE CASE

Respondent deems it necessary to correct certain inaccuracies and omissions in the Statement of the Case of petitioner.

The equipment in question was leased by Brada Miller Freight System, Inc. (Brada Miller) from May Mawby (A. 12) (Donovan affidavit Ex. 1-A and 1-B, A. 16). On or about January 19, 1968, the driver of the equipment, Howard Hardrick, reported to Brada Miller that the equipment needed repairs and would be out of service for several days. Hardrick thereupon furnished Brada Miller with Drivers' Daily Logs for January 19, 20 and 21, 1968, showing the equipment "out of service." (A. 13) (Donovan affidavit Ex. 2-A, 2-B and 2-C, A. 16).

On or about January 18, 1968, Hardrick made application to Transamerican Freight Lines, Inc. (Transamerican) as a driver and an inquiry concerning Hardrick was sent from Transamerican to Brada Miller (A. 88) (Temperly deposition Ex. 15, A. 90). Hardrick furnished Transamerican with a Statement in Lieu of Logs dated January 19, 1968 which showed that Hardrick had not worked for the previous seven days (A. 69) (Temperly deposition Ex. 3, A. 90) and signed a Lease Agreement, purportedly on behalf of Brada Miller (A. 60, 61) (Temperly deposition Ex. 1, A. 90). Hardrick then proceeded to transport a load of steel to Kansas City for Transamerican during which trip a collision occurred near Smithboro, Illinois. Upon arriving in Kansas City, Hardrick furnished Transamerican with Drivers' Daily Logs for January 19, 20, 21, 22, 23 and 24, 1968. (A. 70, 71) (Temperly deposition Ex. 4, 5, 6 and 7, A. 90). Hardrick reported the accident to Transamerican and Transamerican filed a written report on I.C.C. Form M.C.S. 501955 dated 5/17/68. (A. 74, 75) (Temperly deposition Ex. 9, A. 90). Hardrick did not report the accident to Brada Miller and Brada Miller first received knowledge of the accident about May 6, 1968 (A. 15).

It was Transamerican's practice to enter into trip leases directly with the drivers of the equipment (A. 44). Sometimes a driver would just show up at the door (A. 50). Often a driver would call and the dealings would be directly with the driver (A. 51). The driver was required to produce a chauffeur's license, a physical report, drivers' logs and registration papers for the equipment. (A. 45, 46). Transamerican did not require the driver to furnish any written authority from the owner or the lessor of the equipment; Transamerican entered into the trip lease on the basis of the word of the driver and the necessary documents. (A. 46). The instructions to Brada Miller's drivers were that trip leases could be entered into only on written authorization of Brada Miller's terminal manager (A. 29, 33). Hardrick did not have such authority to enter into a trip lease with Transamerican (A. 13, 32).

SUMMARY OF ARGUMENT

Indemnity agreements in equipment leases between carriers in interstate commerce tend to frustrate the provisions of the Interstate Commerce Commission regulations 49 CFR § 1057 which require that exclusive possession, control and use of the equipment and responsibility therefor reside in the lessee.

The case of *Alford v. Major*, 470 F.2d 132 (7th Circ. 1972), held that such indemnity agreements were contrary to public policy and were not enforceable. The statements in other cases which have dealt with this problem to the effect that the lessor in *Alford* retained control of the driver and equipment are not correct. The suggestions in *Allstate Insurance Company v. Alterman Transport Lines, Inc.*, 465 F.2d 710 (5th Circ. 1972), *Carolina Freight Carriers Corp. v. Pitt County Transp. Co.*, 492 F.2d 243 (4th Circ. 1973), and *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, 507 F.2d 100 (6th Circ. 1974), that

indemnity agreements are valid unless there is some violation of I.C.C. regulations would only tend to increase violations. In such cases a lessor could avoid responsibility under an indemnity agreement by exercising control contrary to the regulations.

Indemnity agreements in equipment leases have had the effect of transforming simple lease agreements into agreements designed to shift ultimate responsibility from the lessee to the lessor. As a result leases contain conflicting provisions, some of which recite that the lessee has full responsibility for and control of the driver and equipment while other provisions, contrary to I.C.C. regulations, shift control to the lessor.

Trip leasing by its very nature gives rise to uncertainties regarding the authority of drivers to enter into trip lease arrangements. In the present case there is evidence that the driver was in fact attempting to practice a fraud on the proposed lessor. As a result disputes arise between lessee and lessor which do not serve the public interest and which tend to inhibit investigation and settlement of claims and increase litigation.

In their Amici Curiae brief, the United States and the Interstate Commerce Commission take the position that agreements whereby the lessor agrees to indemnify the lessee have the effect of placing responsibility where it blongs. However, under the common law doctrine of respondeat superior, under the I.C.C. regulations and in fact, liability rests with the lessee. The negligence of the driver is the negligence of the lessee and not of the lessor. Indemnity agreements thus have the effect of shifting liability from the negligent party to the non-negligent party, the very result which the United States and the Interstate Commerce Commission wish to avoid. The solution is to permit the law to place ultimate responsibility without regard to indemnity agreements. Thus each party will ultimately be liable for its own negligence and liability shifting will be avoided.

ARGUMENT

The question before this Court has been decided differently by various United States Courts of Appeals, United States District Courts and State Courts. There is a clear split of authority. The issue is whether an indemnity agreement in a trip lease entered into between two interstate carriers, violates the regulations of the Interstate Commerce Commission (I.C.C.), 49 CFR § 1057, and is therefore contrary to public policy and is unenforceable.

At the outset, respondent would remind the Court that there are in this case unresolved factual issues to be decided at the trial level in the event this Court should reverse. Although determination of these factual issues is not necessary to enable this Court to reach a decision, they are important as hopefully will be made apparent. Relying on the provisions of the trip lease in question and the factual situation surrounding its coming into being, respondent intends to show by a process of induction that indemnity agreements between interstate carriers are contrary to the letter and the spirit of the I.C.C. regulations.

Although this Court might hold that all indemnity agreements in trip leases are not by their nature in violation of I.C.C. regulations and not unenforceable per se, it does not follow that all indemnity agreements are automatically enforceable at the instance of the indemnitee. The various lower courts which have construed the indemnity agreements have had the advantage of dealing only with one lease at a time, while this Court is called upon to pass on all indemnity agreements without regard to their separate differing provisions. Should this Court condemn all indemnity agreements, then the courts will be shed of this problem once and for all. The question for this Court is whether by their very nature they tend to frustrate the purpose of the I.C.C. regulations or have other effects not con-

sistent with the common good. If so, they should be unenforceable; if not, each indemnity agreement must hereafter stand or fall on its own.

Distinction Between Alford v. Major and Subsequent Cases Is Not Valid.

The cases chiefly relied on by respondent are: *Alford v. Major*, 470 F.2d 132 (7th Circ. 1972), affirming 314 F. Supp. 979 (N.D. Ind. 1970); *Denver Midwest Freight Lines v. Busboom Truck*, 207 N.W.2d 368 (Neb. Sup. Ct. 1973), and *Gordon Leasing Co. v. Navajo Freight Lines*, 326 A.2d 114 (N.J. Dist. Ct. 1974).

Other cases, cited by petitioner, have reached contrary conclusions. Some of these cases seek to distinguish *Alford* on the grounds that the indemnification agreement in *Alford* permitted the lessor to maintain full control over the truck and the driver. *Allstate Insurance Company v. Alterman Transport Lines, Inc.*, 465 F.2d 710, 714 (5th Circ. 1972); *Carolina Freight Carriers Corp. v. Pitt County Transp. Co.*, 492 F.2d 243, 246 (4th Circ. 1973); *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, 507 F.2d 100, 102 (6th Circ. 1974). In its *Argument* (Brief p. 12) petitioner adopts the same position.

For example, the court in *Jones Truck Lines* states, 102, "This is true for the obvious reason that in Alford v. Major, supra, the indemnification agreement itself permitted the lessor to retain full control over the truck and driver . . ." Contrary to the language in the cases cited by petitioner, the court in *Alford v. Major* did not find that the lessor exercised control over the driver or that the indemnification agreement permitted the lessor to do so. In *Alford*, lessee took the position that since the driver was in the regular employ of the

lessor, then the actual care, custody and control of the truck remained with the lessor, *through its driver*. The lessee argued that the regulations implicitly acknowledged this practical fact and that since the sole purpose of the regulations was to provide the injured members of the public with a financially responsible defendant, there should be no public policy objection to the indemnity agreement. There is nothing in *Alford* to indicate that the lessee or lessor actually violated any I.C.C. regulations. In *Alford* the lessee *argued* that the actual care, custody and control remained with the lessor through the lessor's driver. In the present case Transamerican *argues* that it had control of the truck which was being operated by Hardrick. The facts are the same. The lessee in *Alford* interpreted these facts as leaving control in the lessor; Transamerican interprets them as placing control with the lessee.

Transamerican made a similar argument in this case to the Court of Appeals, the same Court which decided *Alford*. *Sandra Wear v. Brada Miller Freight Systems, Inc.* (7th Circ. 1974), not reported. (Appendix B, A-6, Petition for Writ of Certiorari.) In rejecting the distinction between *Alford* and *Alterman*, the Court said (Petition for a Writ of Certiorari, A-12):

> "We do not agree that Alford can be distinguished from *Alterman*.[5]
>
> [5] Transamerican contends that in *Alford* the parties agreed to place full control in the lessor; apparently, the *Alterman* court assumed this as well. All that is clear from the *Alford* opinions is that the lessee *argued* that controls remained in the lessor. In any event, our disposition makes this aspect irrelevant."

Despite the misinterpretation given *Alford* by *Alterman et al.*, it is clear that the court in *Alford* did not base its decision on any illegal retention of control by the lessor or any specific violation of I.C.C. regulations. The court in *Alford*

held that indemnity agreements by their very nature conflict with the requirement of control by the lessee.

> l.c. 135 "Therefore, since the indemnification clause would permit Major to circumvent the regulations' requirement that leased carriers exert actual control over the leased equipment and the borrowed drivers, we find that the indemnification clause is unenforceable."

An indemnity agreement running from a lessor to a lessee would as a practical matter weaken the already tenuous bond existing between the lessee and the driver. The driver is in the regular employ of the lessor, his contacts with the lessee are minimal, he is operating his own or the lessor's equipment, after one trip he will be back at his regular job, etc. It is difficult enough for the lessee to exercise tight control over the driver under such conditions. Add to this the fact that the lessee knows that in the event of a casualty he will be protected by an indemnity agreement. Without actually violating any specific I.C.C. regulation the lessee under such circumstances does not have the incentive to exercise the strict control necessary to assure protection to the public. As stated in *Alford* (135) "while it is true that one of the objectives of these regulations was to furnish financially responsible defendants to injured members of the public, this was certainly not the exclusive purpose of the regulatory scheme. *Indeed, highway safety must be considered to have been one of the paramount goals*" (emphasis supplied). A lessee who knows that in the long run he will be required to bear the financial responsibility for injury caused by a negligent driver will not only exercise more care in accepting that driver but will see to it that the driver takes every precaution for the safety of the operation. The best way to assure that the lessee will exercise exclusive possession, control and use of the equipment as required by the regulations is to give him an economic incentive to do so.

Validity of Indemnity Agreements Cannot Be Made to Depend on Whether Regulations Were Violated.

The suggestions in *Allstate*, supra, 714, *Carolina Freight Carriers*, supra, 246, and *Jones Truck Lines*, supra, 102, that the indemnity agreements should be given effect unless there is some violation of I.C.C. regulations is entirely unworkable. In the first place, the determination of whether a violation existed could be made only by a court, thus increasing the litigation already existing in this area. Of greater concern is the likelihood that such a rule would have the tendency to encourage violations of I.C.C. regulations. In order to avoid liability under the indemnity agreement, a lessor need only claim that it did in fact exercise control over the driver and the equipment. Thus the very act of violating the regulations would release the lessor from responsibility under the indemnity agreement. The alternative to such a rule would be to enforce all indemnity agreements despite violations of the regulations. This would have the equally absurd result of enabling the lessee to violate the regulations with impunity and with the assurance that the lessor must eventually reimburse him for any loss. More than anything this points up the folly of attempting to separate the obligation of control from the ultimate financial obligation. The duties of a lessee under a trip lease agreement may be rather onerous. But the public good requires that they be carried out in strict compliance with the law. The knowledge that someone else eventually will bear the cost of failure will have the effect of making failure more likely.

Transamerican's Lease Agreement Violates the Requirements of the I.C.C. Regulations.

I.C.C. regulations only require that trip leases contain a few specific agreements including a provision that the lessee exercise full responsibility and control. The addition of an indem-

nity agreement adds a foreign element to the trip lease. Instead of the simple lease contract contemplated by the regulations, the trip lease has become a vehicle to shift the ultimate responsibility from the lessee to the lessor. An analysis of the Lease Agreement (Appendix to petitioner's brief) discloses that most of its provisions appear to support and bolster the indemnity agreement. The agreement to lease equipment seems to be much less important than the indemnity clause and its supporting clauses. Since the Lease Agreement was prepared by or for Transamerican, it is only natural that the drafter would use great care to see that the indemnity provision is as favorable to Transamerican as possible. Of necessity, however, the drafter is faced with the difficulty of reconciling conflicting ends: he must leave control in the lessee but place ultimate responsibility on the lessor. As a result, the various provisions of the Lease Agreement are in hopeless conflict and taken as a whole the Lease Agreement violates both the letter and the spirit of the regulations.

Transamerican in its brief (P. 11) refers to Paragraph 4 of the Lease Agreement to show that it exercised the necessary control:

> It is mutually understood and agreed, that the First Party (Transamerican) during the term of this lease shall have the control and responsibility for the operation of said equipment in respect to the public, shippers and Interstate Commerce Commission for such period that said equipment is operated under the terms of this lease as provided in Paragraph 1 hereof.

Transamerican states that it did in fact exercise control (Brief p. 11). That is not really the issue, however, as the question before this Court involves the validity or invalidity of the indemnity agreement. A contract which is contrary to public policy is void even though in the particular circumstances no

injury resulted to the public. The test to be applied is not what was actually done but what might have been done under the terms of the contract. 17 *CJS, Contracts*, § 211, *Weil v. Neary*, 278 U.S. 160, 49 S.Ct. 144, 73 L.Ed. 243 (1929). The rights and obligations of the parties to this contract cannot be discovered merely from a reading of paragraph 4. It is necessary to examine the Lease Agreement as a whole to find out what these rights and obligations are and thus to determine if the contract violates the I.C.C. regulations.

The whole purpose behind trip leasing is to enable a certified carrier to augment its equipment by leasing from other certified carriers or from owners of the equipment. Originally, equipment leasing resulted in a practice where authorized carriers used non-owned equipment under oral agreements which often created difficulties in fixing the lessees' responsibility for accidents. The leasing carriers often failed to inspect the equipment used or to supervise the operation of the vehicles. In answer to the difficulties thus created, the I.C.C. held hearings and established regulations which were upheld in the Supreme Court's opinion in *American Trucking Association v. United States*, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1952). The purpose of the regulations was "to protect the industry from practices detrimental to the maintenance of sound transportation services . . ." and to assure safety of operation for vehicles and drivers. *American Trucking Association v. United States*, supra, 310. The regulations and the cases construing the regulations leave no doubt that the lessee carrier is to be the carrier in fact. Strongly disapproved are arrangements whereby carriers engage in joint ventures where one carrier furnishes the equipment and the other furnishes the license. *Carriers Insurance Exchange v. Truck Insurance Exchange*, 310 F.2d 653 (4th Circ. 1962). The actual, physical transportation of goods must be done by the lessee carrier and under its complete direction, responsibility and control.

Turning to the Lease Agreement under which Transamerican bases its claim for indemnity against Brada Miller (appendix to Petitioner's Brief A-1, A-2) it is agreed:

> 1. "The Second Party (Brada Miller) hereby leases to the First Party (Transamerican) the following motor vehicle equipment . . . for the movement in interstate commerce for the duration of one (1) single trip . . . of such freight which First Party shall turn over to Second Party and the Second Party agrees to transport such freight . . ."

This provision is clearly contrary to the regulations and to the cases construing the regulations. The Lease Agreement specifically provides that Transamerican shall turn the freight over to Brada Miller and that Brada Miller "agrees to transport such freight", whereas the duty to transport the freight belonged to Transamerican.

Furthermore (Appendix to Petitioner's Brief A-2):

> 3. "Second Party further agrees that it will bear the entire cost of operating said motor vehicle equipment, and that it will at all times keep said motor vehicle equipment in good mechanical condition, order and repair, and will cause said motor vehicle equipment to be operated only by a competent employee of the Second Party . . ."

These responsibilities cannot be separated from control. Yet the lessee carrier under the regulations is supposed to be in complete control "from the time the equipment passes the inspection required to be made by lessee" 49 CFR § 1057.3(a). A requirement that the lessor will "keep said motor vehicle equipment in good mechanical condition, order and repair" is not consistent with control in the lessee and places a duty on the lessor that the regulations place squarely on the lessee. The requirement

that Brada Miller "cause said motor vehicle equipment to be operated by a competent employee of the Second Party" has the effect of allowing control over the operation of the vehicle to remain with Brada Miller.

Paragraph 5 of the Lease Agreement (Appendix to Petitioner's Brief A-2, A-3) places even more responsibility on the lessor:

> 5. "Second Party further agrees that in the operation of said motor vehicle equipment it will comply with all the rules and regulations of the Bureau of Motor Carriers of the Interstate Commerce Commission, and the applicable rules and regulations of any public utility commission and of any other similar state authority: that it will observe all pertinent rules and regulations governing the hours of service of its drivers of (sic) helpers, and all regulations, laws and ordinances of any government authority applying to the operation upon the public highways of said motor vehicle equipment . . ."

Again, this provision assumes that the vehicle will be operated by Brada Miller. The rules and regulations involved might include weight and size limitations, speed limits, tire pressure requirements, braking regulations, headlight and taillight requirements, use of certain roads and other requirements of federal, state and local authorities. Compliance with such rules and regulations presupposes the right and duty of the lessor to control the operation of the vehicle. The requirement that the lessor "observe all pertinent rules and regulations governing hours of service of its drivers" assumes a close exercise of control over the physical person of the driver.

The cases relied on by Transamerican: *Carolina Freight Carriers Corporation v. Pitt County Transportation Company*, supra, *Allstate Insurance Company v. Alterman Transport Lines, Inc.*,

supra and *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, supra, all sought to distinguish *Alford v. Major*, supra, on the ground that in *Alford*, the lessor in fact retained control over the truck and the driver. As pointed out above this distinction is probably not valid. But it raises a most interesting point. Here we are concerned with the validity of a contract rather than what was in fact done in one particular instance. If the courts in *Carolina Freight Carriers, Allstate Insurance* and *Jones Truck Lines* had been construing the Lease Agreement in question would they not have found that the agreement by its very terms provided that Brada Miller "agrees to transport such freight" and that Brada Miller was required to exercise tight control over the vehicle and its driver? No other finding is possible under the terms of the lease. And having thus found, the statements in *Carolina Freight Carriers, et al.*, would have left the courts no other choice but to declare the indemnity agreement invalid.

The decisions construing the regulations make it clear that under a trip lease agreement, the driver becomes the agent and employee of the lessee. Here the driver at the time of the accident was employed by Transamerican. In *Simmons v. King*, 478 F.2d 857, 867 (5th Circ. 1973), there was raised the question of the status of the driver King with relation to the lessee:

> l.c. 867. Here the lease specifically stated that Dubose as lessee assumed "full responsibility . . . to the public" as required by § 1057.4. Requisite placards and an inspection were also provided by Dubose as required by § 1057.4. The deliberate fulfillment of these statutory prerequisites by the parties must be viewed as giving rise to a statutory relationship, since these regulations have the force and effect of law, Cox v. Bond, supra, 249 A2d at 586. Since under the lease Dubose assumed exclusive possession, control and use of the vehicle and responsibility to the public then King became his statutory employee, and as such

> Dubose was vicariously liable as a matter of law for the negligence of King.

See: *Cox v. Bond*, 249 A.2d 579 (Sup. Ct. N. J.); *Cosmopolitan Mutual Insurance Company v. White*, 336 F.Supp. 92 (D.C. Del. 1972) and *Proctor v. Colonial Refrigeration Transportation, Inc.*, 494 F2d 89 (4th Circ. 1974). In *Branneker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524, the Supreme Court of Missouri in considering the same problem wrote:

> l.c. 533 "The essential element in determining whether the driver of a motor vehicle is the agent or servant of the owner at the time of the wrongful act is the owner's right to control and direct the driver's conduct . . . A man cannot serve two masters at the same time, and although there may be a joint employment and also acts for which more than one employer may be liable, nevertheless there is no several liability of two persons, not acting jointly, as separate masters of a single servant for the same act."

Barsh Truck Lines, Inc. v. Jerry Lipps, Inc., 424 S.W.2d 81 (Mo. App. 1968).

The Lease Agreement Paragraph 3. provides, however, that the driver remains the employee of Brada Miller. (Appendix to Petitioner's Brief A-2)

> 3. "Second Party . . . will cause said motor vehicle equipment to be operated only by a competent employee of the Second Party, in which event said employee of the Second Party shall be the representative of the Second Party in the premises. It is being expressly understood and agreed that nothing herein is to be construed as constituting Second Party, its agents, servants and employees, as the agent, servant, employee or representative of the First Party."

These provisions of the trip lease are in direct conflict with the regulations and the cases. Transamerican denies that the driver

is its "agent, servant, employee or representative" whereas the law decrees nothing less. If the driver is not even Transamerican's "representative", then how does Transamerican maintain the "exclusive possession, control and use of the equipment" required by the regulation? It is not enough for Transamerican to admit responsibility to the public for the regulations require responsibility *and* control.

The indemnity provision of the Lease Agreement provides:

> 9. It is mutually understood and agreed by and between the parties hereto that First Party shall not be responsible to Second Party, its agents, servants and employees, for any negligence of the Second Party, its agents, servants or employees, or for any loss, damage, injury or expense arising out of the failure of Second Party to carry out the terms of this Agreement. Second Party hereby agrees to indemnify and save harmless First Party from any and all claims, suits, losses, fines or other expenses arising out of, based upon or incurred because of injury to any person or persons, or damage to property sustained or which may be alleged to have been sustained by reason of any negligence or alleged negligence on the part of Second Party, its agents, servants or employees, and for any loss or damage to cargo resulting form [*sic*] any negligence or unlawful act of Second Party, his agents, servants and employees. It is mutually understood and agreed that Second Party will defend, at his own expense and cost, any and all suits that may be brought against First Party for injuries sustained, including death resulting therefrom, or damage to property caused or alleged to have been caused by the negligence of any person employed by Second Party, while engaged in the performance of any of the work required by the terms and conditions of this Agreement, and for any cargo loss sustained resulting from any negligence or unlawful act on the part of Second Party, his agents, servants and employees. Nothing in this Paragraph 9 contained shall be construed to in anywise limit the liability of the Party of the First Part to the public in connection with the use of said equipment under this Agreement.

This paragraph provides indemnity to Transamerican for losses resulting from the negligence of Brada Miller's "agents, servants or employees". This is the heart of Transamerican's claim against Brada Miller. In its Amended Crossclaim (A. 6) in paragraph 5, Transamerican alleges that "The motor vehicle referred to in plaintiff's petition . . . was being driven and operated by an agent, servant and employee of defendant Brada Miller Freight System, Inc." The person referred to was the driver, Hardrick. At the time of the accident out of which the lawsuit arose Hardrick was operating the equipment either on behalf of Transamerican or on behalf of Brada Miller. If the operation was on behalf of Transamerican, then the indemnity agreement by its terms cannot apply to Brada Miller as Hardrick was not then the "agent, servant and employee" of Brada Miller. *Branneker v. Transamerican Freight Lines, Inc.*, supra. If the operation was on behalf of Brada Miller then the Lease Agreement was a subterfuge and was in violation of the I.C.C. regulations. *Carolina Freight Carriers Corp. v. Pitt County Transportation Co.*, supra, *Allstate Insurance Company v. Alterman Transport Lines, Inc.*, supra, *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, supra. There can be no doubt that under the I.C.C. regulations and in fact, Hardrick was operating the equipment for Transamerican and not for Brada Miller and Hardrick was Transamerican's "agent, servant and employee" at the time of the casualty.

The Lease Agreement under which Transamerican seeks to recover from Brada Miller violates the I.C.C. regulations. It was drafted in an attempt to place full responsibility and control on Brada Miller. Paragraph 4, which recites that control and responsibility for the operation of the equipment

shall be with Transamerican, is simply cant and is contrary to the language and intent of the rest of the agreement. This more than anything illustrates why indemnity agreements in trip leases are not compatible with the I.C.C. mandate.

Naturally, there is pressure on the drafter to make the terms of the contract as favorable to his interests as possible. Since interpretations vary, care must be taken to conform to the laws of various jurisdictions. For example, the courts of Missouri and indeed of most jurisdictions will not construe an indemnity contract to indemnify one against his own negligence unless such intent is clearly expressed. *Monsanto Company v. Port of St. Louis Investments, Inc.*, 350 F.Supp. 502 (E.D. Mo.). This limitation might be obviated by reciting in the contract that the driver is under the control of and is the employee of the lessor. Then the lessor would be liable for the driver's negligence. Obviously, that is what was done in Transamerican's Lease Agreement. The contract is loaded with provisions that have little to do with the leasing of equipment in compliance with I.C.C. regulations. Most of the provisions are concerned with placing control and responsibility on Brada Miller. Thus the leasing provisions of the agreement become lost in those provisions which will enable Transamerican to shift liability to Brada Miller; the tail in truth wags the dog.

Uncertainties of Trip Leasing Give Rise to Delay and Litigation.

Although there are factual disputes in this case which can only be resolved at the trial level, respondent believes it is important that this Court be familiar with the nature of these disputes. In determining whether indemnity agreements in trip leases are contrary to public policy it is not sufficient for the Court to examine the agreements in a vacuum. Re-

spondent believes that it is important for the Court to understand the circumstances in which these agreements come to life and what effect these circumstances might have, good or bad, on the purposes of the I.C.C. regulations. Trucking operations in interstate commerce involve large numbers of units of equipment, both power units and trailers. Many if not most of the power units are actually owned by fleet brokers or individuals and are leased by I.C.C. carriers. For example, Brada Miller had under lease approximately seven hundred power units (A. 20) All power units in the Transamerican Steel Division were under lease (A. 43). In addition the carriers augment their equipment by trip leasing and engage in the practice of interchange of equipment, both of which practices are regulated by 49 CFR § 1057. By its very nature the interstate trucking business involves situations where temporarily unoccupied drivers and idle equipment seek out employment. "Hustling" loads is not an unknown practice in the industry. *Cosmopolitan Mutual Insurance Company v. White*, supra; *Mellon National Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473 (3rd Circ. 1961). Ronald Temperly in his deposition testified that Transamerican's practice was to enter into trip leases directly with the drivers of the equipment (A. 44, 50, 51). Although the driver was required to produce certain documents, these did not include written authorization from the owner of the equipment. Transamerican was content to take the word of the driver that he in fact had the necessary authority to sign the trip lease (A. 46).

Whether or not Hardrick did in fact have authority to bind Brada Miller is not an issue for decision by this Court. But there is substantial evidence that Hardrick in driving for Transamerican was attempting to practice a fraud on Brada Miller. Since the equipment was under lease to Brada Miller, Hardwick had the duty to drive it in Brada Miller's service. Instead, Hardrick advised Brada Miller that the equipment was in need of

repairs and furnished Brada Miller with driver's logs showing that the equipment was "out of service" (A. 13, Ex. 2-A, 2-B and 2-C, A. 16). Thereafter Hardrick appeared at Transamerican, made application for employment as a driver (A. 89, Ex. 15, A. 90), furnished Transamerican with a Statement in Lieu of Logs (A. 69, Ex. 3, A. 90), assumed to sign a Lease Agreement on behalf of Brada Miller (A. 60, 61, Ex. 1, A. 90) and undertook to deliver a load of steel for Transamerican. On completion of the trip Hardrick furnished Transamerican with driver's logs for some of the same dates the logs furnished Brada Miller showed "out of service" (A. 70, 71, Ex. 4, 5, 6 and 7, A. 90). These facts clearly illustrate the uncertainty that of necessity surrounds the making of trip leases in interstate carrier operations. Practices become difficult to control and a lessee can never be certain that the driver who seeks employment is in fact authorized to bind the proposed lessor. The case of *Chicago RI & PR Co. v. Chicago B & Q R Co.*, 437 F.2d 6 (7th Circ. 1971) cited by petitioner presents an entirely different situation. There was involved two railroads which were signatories to the Standard Form Detour Agreement, an agreement adopted by the predecessor of the Association of American Railroads in 1905. Trip leases on the other hand are not standard form agreements. There are probably as many trip lease contract forms as there are carriers using them, each of course carefully written to the drafter's best advantage. In addition, railroad trains are not leased from one road to the other under circumstances which leave in doubt the authority of the driver (or engineer) to bind the lessor. The institution of trip leasing presents special problems calling for special solutions. These solutions do not include indemnity agreements between carriers.

Because of the uncertainties surrounding the making of trip leases it becomes difficult to define the areas of responsibility between the lessor and the lessee. Factual disputes are not unusual and opinions will differ concerning the legal rights and obligations of the parties. A lessor who is called upon to pay

because of an accident caused by a driver under the lessee's control is naturally reluctant to do so. Questions are raised concerning the authority of the driver to bind the lessor or concerning the employment of the driver at the time of the casualty. Attorneys dispute the effect of the differing and sometimes conflicting provisions of the lease and disagree on the interpretation of indemnity agreements. Insurance companies which have an interest seek to be heard and exercise influence. These conflicts result in delays which are not in the public interest. They have an inhibiting effect on the investigation and disposition of claims as well as tending to increase litigation.

Responsibility to the public requires prompt investigation and settlement of meritorious claims. However, if the lessee expects to be indemnified by the lessor there is less pressure on the lessee to investigate the accident and bring the matter to a conclusion. The fact that Transamerican did not file a report of the accident to the I.C.C. for almost four months would indicate it took this responsibility rather lightly (Ex. 9, A. 90). Brada Miller had no knowledge of the accident until May 6 and of course could make no investigation of the facts before that date (A. 15). Even though a lessee may acknowledge its responsibilities to the public, the belief that ultimately the lessor will pay removes some of the urgency to dispose of claims. This points up the difference between indemnity arrangements and insurance. The insurance company has a complete identity of interest with its insured. It is the insurance company's responsibility and it is in its best interests to investigate and pay claims. The indemnitor-indemnitee relationship is different. Each may look to the other to assume the work of investigation and to pay the claims. The ultimate responsibility can be decided later. Often indemnitors are joined as third party defendants and the plaintiff's lawsuit must provide a forum to determine the competing interests of the indemnitor and indemnitee.

The great amount of litigation over indemnity agreements in trip leases can be halted if the agreements are held to be contrary to public policy. Otherwise the various indemnity clauses will continue to be objects of litigation and the courts will be called upon to construe them one by one. This does not serve the public interest. The attempts to shift responsibility between trucking firms are costly, time consuming and place an entirely unnecessary burden on the courts. The I.C.C. regulations have placed responsibility on the lessee and the frustration of this policy by indemnity provisions should be terminated.

The Supreme Court of Nebraska in *Denver Midwest Motor Freight v. Busboom Truck, Inc.*, 207 N.W.2d 368, had occasion to confront this issue and recognized the split of authority between *Alford v. Major*,supra and *Allstate Insurance Co. v. Alterman Transport Lines, Inc.*, supra. In following the Seventh Circuit's decision in Alford the court said:

> L.C. 371 The approval of indemnity provisions under the circumstances here might well adversely affect the safety of operation of vehicles and drivers as suggested in Alford. It would also inject into trip lease negotiations an added element of uncertainty and permit carriers to circumvent the clearly spelled out requirements that a lessee exert actual control over leased equipment and borrowed drivers. Varying conditions and provisions of indemnity clauses when applied to varying factual situations introduce added elements of uncertainty and tend to blur lines of responsibility to the public between lessor and lessee and increase the prospect of litigation between carriers or their insurers without any corresponding benefit to the public. Insurance coverage of carriers might be adversely affected where tort liability of others is assumed by contract if such indemnification clauses were enforceable. If indemnity clauses in these circumstances are unenforceable, uncertainty is removed, statutory and regulatory provisions

> are fully enforced, and public policy is best served. We therefore hold that an indemnification clause in a trip lease of operating equipment by a licensed motor carrier, subject to ICC regulations, which obligates the lessor to reimburse the lessee for any payment made on account of any accident, claim, or suit arising out of the operation of the equipment during the term of the lease is unenforceable as against public policy. Such a clause would permit the lessee to circumvent the requirements of the Interstate Commerce Commission that unauthorized carrier lessees to exert actual control over the leased equipment and the borrowed drivers. Alford v. Major, 470 F.2d 132 (7th Cir.).

The judgment of the District Court was correct and is affirmed.

Respondent submits that the Nebraska Court's concern is justified by the present case.

The Effect of Indemnity Agreements Is to Shift Liability From the Lessee Who Has Control to the Lessor Who Does Not, Contrary to the Position of the United States and the Interstate Commerce Commission.

Respondent respectfully submits that the position of the United States and of the Interstate Commerce Commission as set out in their Amici Curiae brief is bottomed on a false premise: that the lessor retains physical moment to moment control over the leased vehicle and performs the "ministerial" task of moving the freight (Brief, pp. 7, 8, 9, 16). This position assumes that absent the I.C.C. regulations liability to the public would rest solely with the lessor and that it is only by reason of the "responsibility and control" regulations that the lessee has any liability. According to the Amici Curiae brief

the only requirement is that the lessor not retain control over the route and destination of the freight and that the operation be conducted under the lessee's name (Brief p. 16); otherwise the lessor has full control.

Under the doctrine of respondeat superior, the lessee would normally be liable for damages caused by the negligence of the driver. The regulations reinforce this responsibility. In none of the cases upholding the indemnity clauses, has there been any suggestion that the driver remained under the control of the lessor. The driver in fact became the agent and employee of the lessee for the purpose of making the trip under consideration. In *Allstate v. Alterman, supra* (714-715) it was held that Stewart, the driver, was under the actual control of the lessee. In *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, supra, the court found that the driver was the lessee's agent. The court in *Jones* held that the indemnity agreement did in fact relieve the lessee of its own negligence. Indeed, all of the cases assume that the purpose of the indemnity agreement is to require the lessor to reimburse the lessee for the lessee's own negligence.

In this case and in all of the cases dealing with this problem, the negligent actor was the driver. The lessor and lessee are liable if at all under the doctrine of respondeat superior or by reason of the I.C.C. regulations. The regulations place control and responsibility in the lessee. The common law through respondeat superior also places responsibility on the lessee rather than on the lessor. In *Carolina Casualty Insurance Company v. Transport Indemnity Company*, 488 F.2d 790, 794 (10th Circ. 1973), cited in the Amici Curiae brief, the court held that the driver was a special employee of the lessee and liability of the lessee was vicarious, i.e., by reason of the negligence of the driver. Similarly, in *Pacific National Insurance Company v. Transport Insurance Company*, 341 F.2d 514, 518 (8th Circ. 1965), it was held that the driver

was the agent of the lessee and *because of this relationship* the law imposed liability on the lessee. Under a trip lease, the law does not allow control to remain in the lessor as suggested in the Amici Curiae brief. The negligence of the driver is not through legal fiction the negligence of the lessor but rather that of the lessee. Of course, the lessor may be negligent if it furnishes defective equipment or an accident-prone driver, but it is not vicariously liable for negligent acts of the driver. Once the driver consents to drive for the lessee and actually enters into that employment and assuming the power of the lessee to control the details of the work, then the lessee and not the lessor is responsible for the driver's negligence. *Barsh Truck Lines, Inc. v. Jerry Lipps, Inc.*, supra (83). *Branneker v. Transportation Freight Lines Inc.*, supra (53). Indeed, the realities are that the lessee maintains actual control. The lessee tells the driver where to go and what route to follow (A. 83-84). He gives the driver expense money (A. 82). There can be no doubt that the lessee has the right and duty to control the details of the work. On completion of the trip the driver furnishes the lessee with driver's logs (A. 70). The driver reports accidents directly to the lessee (A. 73). The only way the lessor could maintain control is through general employment of the driver, but as shown when the driver enters into the special employment of the lessee, the lessee becomes responsible for his negligence. The I.C.C. regulations reinforce the common law in this respect, the cases holding that the driver becomes the "statutory employee" of the lessee. *Simmons v. King*, supra; *Cox v. Bond*, supra.

The position taken by the United States and the Interstate Commerce Commission in the Amici Curiae brief that the lessee maintains physical control of the vehicle and driver and performs the "ministerial" task of moving freight has no foundation in law or in fact. It has support neither in the common law doctrine of respondeat superior nor in the regulations and we doubt seriously that petitioner would be willing to adopt

this position. The purpose of the indemnity agreements is not to place the ultimate responsibility where it rightfully belongs as suggested in the Amici Curiae brief, but rather to shift the liability from the lessee who has control in fact and in law to the lessor who has not. It has no other purpose, for if the law placed ultimate responsibility on the lessor, the indemnity agreement would be unnecessary. Respondent readily admits that the lessor should pay for its own negligence; however, to require it to pay for the lessee's negligence does violence to the regulations. This is admitted in the Amici Curiae brief, p. 9: "On the other hand, the objective of safe operation might be frustrated if the indemnification clause also required the lessor to indmenify the lessee for the lessee's negligence, but the clause in this case does not do so." Although the indemnity provision in Transamerican's lease permits the lessee to recover from the lessor only for the negligence of the lessor's agents, servants and employees, paragraph 3 of the lease provides that the driver remains the employee of the lessor and is not the "agent, servant, employee or representative" of the lessee. This as indicated is contrary to fact and to law.

The United States and the Interstate Commerce Commission appear to misunderstand the purpose of the indemnity agreements. They are not intended to place ultimate responsibility where it belongs. As indicated in the Amici Curiae brief, such a purpose would be consistent with the I.C.C. regulations and would have a beneficial effect. However, no agreement would be necessary to reach that end. The purpose of these agreements is to shift responsibility from the lessee where the law places liability for the driver's negligence to the lessor who has no liability under the common law or the regulations. As the Amici Curiae brief concedes, this would tend to have a harmful effect and on this point respondent, the United States and the Interstate Commerce Commission are in full agreement.

Respondent respectfully suggests that there is an obvious solution to the problem fully in accord with the position taken by the United States and the Interstate Commerce Commission. Indemnity agreements which have the effect of shifting liability from the negligent party to the non-negligent party should not be allowed. Thus liability arising out of the negligent acts of the driver would remain with the lessee who has control in fact and in law. Where the negligence of the lessor in furnishing defective equipment, an accident-prone driver, etc. is the proximate cause of the casualty, the lessee should be entitled to indemnity from the lessor. The law would thus control the rights of the parties. There would remain a strong incentive for both parties to exercise due care within the areas of their responsibility, with the knowledge that liability for their negligence cannot be shifted. Litigation would be reduced and the courts would be relieved of the responsibility of construing self serving lease contracts and indemnity agreements which conflict with the law and the regulations. Liability shifting agreements have no place in trip lease contracts.

CONCLUSION

For the reasons given this Court should affirm the decisions of the District Court and of the United States Court of Appeals granting Summary Judgment to Brada Miller Freight Systems, Inc.

Respectfully submitted

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No. 74-54

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

TRANSAMERICAN FREIGHT LINES, INC.,
Petitioner,

v.

BRADA MILLER FREIGHT SYSTEMS, INC., et al.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

To Brief of Respondent on the Merits

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v.

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

To Brief of Respondent on the Merits

Two things which become apparent from a study of Respondent's Brief are, respondent's desire to inject for consideration and decision by this Court, issues which are not included in the question presented for review and which were not presented to or considered by the courts below, and respondent's continued insistence upon the injection into the case at this time of facts which are not relevant or material to the issue involved.

STATEMENT OF THE CASE

On page 2 of its brief Respondent, Brada, asserts that there are inaccuracies in the Statement of the Case contained in Petitioner Transamerican's brief and yet no such inaccuracies are cited or referred to. Then, in purporting to supply facts omitted from Transamerican's brief, Brada proceeds for one and one-half pages with a recitation of evidence which is disputed and which is totally immaterial to the issue before this Court.

For purposes of consideration of Brada's Motion for Summary Judgment by the District Court, the existence of a lease between the parties is assumed. Brada's "Statement of the Case" contains facts which relate only to the question of the existence of the lease, a question not material at this time. The evidence which is recited in its statement by Brada is disputed, both as to the factual content and as to the inferences which can be drawn therefrom.

In its recitation of these disputed and immaterial facts in its statement and in its argument, Brada has failed to advise the Court that the evidence in this case also shows that for a long period of time prior to the January 22, 1968, occurrence in this case, Brada had trip-leased vehicles with drivers to Transamerican and had entered into thirty-one such leases during the two years prior to this occurrence. Transamerican's reliance upon the word of the drivers in these various leases was never questioned by Brada. (See Appendix filed in the United States Court of Appeals for the Seventh Circuit in the within action, pages 45-108.) During that period of time Brada was paid over $5,000.00 by Transamerican for those trip-leases. (Appendix, Seventh Circuit, pages 110-112.) Additionally, Brada willingly accepted payment from Transamerican for the very lease involved in this case and Brada's records show that the check given them by Transamerican for this lease clearly described the purpose of such payment. (Appendix, Seventh Circuit, pages 119, 366, 380.)

The trip-lease to Transamerican in the present case took the Brada truck and driver from Detroit to Kansas City. At the conclusion of this trip the Brada driver picked up a load *for Brada* and carried it on his return trip to Detroit. (Appendix, Seventh Circuit, page 334.)

Transamerican apologizes to the Court for the necessary reference to evidence not contained in the Appendix filed herein. As stated, however, all of this evidence is immaterial to the issue presented at this time and in the preparation of the Appendix it was not felt necessary to include this evidence.

ISSUES NOT INCLUDED IN QUESTION PRESENTED

Brada's Motion for Summary Judgment stated, "That the pleadings, depositions, answers to interrogatories and exhibits on file show that the indemnity provision of the trip-lease, set out in paragraph 3 of Amended Crossclaim of Defendant Transamerican Freight Lines, Inc., is contrary to public policy and is unenforceable." (A. 91). This was the issue presented to the courts below (Appendix to Petition A-1 through A-13.). Brada's position has been that this issue was determinative of the case regardless of the other facts. This position has been supported by the decisions of the District Court and the United States Court of Appeals for the Seventh Circuit. Brada now wants this Court to decide the validity of clauses in the lease between the parties other than the indemnity provision (Respondent's brief 12-15) and Brada is also asking this Court to rule that the driver of the truck was not Brada's employee. (Respondent's brief 14-17, 23-27). Neither of these issues was decided by the courts below nor are they included in the question presented to this Court for review. The decisions below were based solely upon the holding that the indemnity provision in and of itself was invalid because it violated the control and responsibility provisions of the I.C.C. regulations.

REPLY TO ARGUMENT

Further comments are necessary with regard to certain specific statements contained in Respondent's brief.

On page 7 of its brief in considering the control and responsibility provisions of the I.C.C. regulation Brada states that Transamerican "argues" that it had control and Transamerican "interprets" the facts as placing control with Transamerican. For purposes of this case, the question of control and responsibility by Transamerican was not merely an argument or an interpretation of Transamerican. That Transamerican had control and responsibility was a conceded fact. In its Memorandum filed with the District Court Brada stated, "In addition, Transamerican did in fact exercise complete control over the driver Hardrick * * *." (A 95) and further, "Transamerican does not dispute, indeed there could be no dispute, that Transamerican had complete control of the truck and driver and complete responsibility 'for the operation of said equipment in respect to the public, shippers and Interstate Commerce Commission' (Trip Lease, paragraph 4)." (A 97)

The District Court in its opinion stated "Transamerican contends that in the present case it had complete control and responsibility for the tractor and trailer covered by the lease, and Brada Miller does not dispute this contention for purposes of this hearing." (Appendix to Petition, A 4.)

On page 8 of its brief Brada argues that to require the lessee to bear the ultimate financial responsibility for injury caused by a negligent driver will promote highway safety. We fail to see how it would be conducive to highway safety if the driver of the

truck and his full-time employer, the lessor, were to be unaccountable financially while all of the responsibility was left to the lessee who may never see the driver involved after the conclusion of a single trip and who has no means of employee discipline.

On page 9 on its brief Brada argues that to uphold the validity of an indemnity agreement where there has been compliance with the I.C.C. regulations would encourage violations of the regulations and that a claim of control by the lessor would permit it to avoid the indemnity agreement. This is a specious argument. It is based upon the assumption that either an actual exercise of control by the lessor or a claim by the lessor that it exercised control over the driver would be sufficient to avoid an indemnity agreement. Actually, it is the conduct of the lessee which is important under the regulations. We submit that, if anything, such a rule would encourage more precise compliance by lessees as a group and certainly the courts would not permit a lessor to defend an indemnity claim against him with the claim that he was otherwise in breach of the contract.

From page 12 through page 17 of its brief, Brada has set forth a series of arguments contending that the lease agreement between the parties was invalid for reasons separate and apart from consideration of the indemnity agreement. Brada contends that various provisions of the lease agreement other than the indemnity clause also violate the I.C.C. regulations. As we have stated previously in this Reply Brief, these contentions are not contained in Brada's Motion for Summary Judgment, have not been considered or ruled by the courts below and are not included in the question presented for decision here. Also, consider Brada's contention in its Memorandum of Law filed with

the District Court that "Transamerican's printed form of trip-lease conforms to the I.C.C. regulation * * *." (A 94)

In quoting paragraph numbered 1 of the lease on page 12 of its brief Brada has omitted important language. The requirement that the truck be operated by Hardrick is omitted in Brada's brief as also is the more important requirement that the transportation follow without deviation the authorized routes of Transamerican.

Nothing in this paragraph detracts from the required control and responsibility assumed by Transamerican and in fact the contrary is true. Transamerican's control over the service is emphasized by the requirement that Transamerican's authorized routes be followed.

The remaining clauses of which Brada complains were also contained in the leases in the Alterman, Jones and Carolina Carriers cases. See *Allstate v. Alterman*, 465 F.2d 710, l.c. 712, 713, *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, 507 F.2d 100. Appendix to Petition for Writ of Certiorari pending in this Court Number 74-973, Appendix E page A-23, *Carolina Freight Carriers Corporation v. Pitt County Transportation Company*, 492 F.2d 243, l.c. 244. As pointed out in both Petitioner's brief (Note 1, page 11) and the Brief of the United States and the Interstate Commerce Commission (page 16) the Commission has stated that an authorized carrier furnishing services in vehicles owned and operated by others must control the service to the same extent as if he owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the shipper, the public and the Commission for the transportation.

None of the paragraphs of the lease of which Brada complains detract from Transamerican's control of the service or from Transamerican's responsibility to the shipper, the public and the Commission. The lease requires certain performance

on the part of the lessor. However, it is important to note that Transamerican remains responsible to the shipper, to the public and to the Commission for any failure on the part of Brada to perform these things required of it by the lease. At the commencement of the lease, Transamerican had made the appropriate thorough inspection of the leased equipment and had assumed responsibility to the public for such equipment. The lease requirement that Brada thereafter maintain the mechanical condition of the vehicle does not alter Transamerican's responsibility. If Brada were to make faulty repairs which would then cause an accident, Transamerican would remain responsible to the public for Brada's carelessness. For the lease to require mechanical maintenance by the lessee would open the door for all manner of over-reaching and imposing. For the use of a vehicle for one trip a lessee might find himself paying a large sum of money to repair a transmission breakdown, for example, or some other item of major repair providing a windfall benefit to the lessor. Presumably the rental rates for the lease of the equipment are adjusted to cover the cost of normal maintenance.

In the Allstate case, *supra*, the lessor challenged a similar maintenance provision of the lease agreement. The decision in that case upheld the propriety of the provision. *Allstate v. Alterman*, 465 F.2d, l.c. 713.

At several places in its brief Brada makes argument with regard to the status of the driver and the relationship of the driver to the lessor and lessee respectively. (Respondent's brief 14-18, 23-27.) As stated previously herein, this subject is not appropriately covered in the question presented to this Court and the question has not been considered or ruled upon by the courts below.

In any event, it appears that Brada's entire arguments on this subject are directed to a consideration of Brada's relationship to the public through the driver. Brada's argument seems to be based upon a contention that the driver was not within the scope of his employment by Brada during the lease, therefore Brada could not be liable to an injured third party because of the driver's negligence and therefore Brada could not be liable to Transamerican by virtue of the contract. This argument is erroneous. First, there is ample evidence to show that the driver was within the scope of his employment for Brada. Clearly, this does not conflict with the control and responsibility of Transamerican which is provided for by the lease agreement and by the I.C.C. regulations. Second, the contractual provisions of the lease agreement are clear in their intent and thoroughly describe the relationship between the parties and the driver as intended by the lease.

What was the relationship between Brada and the driver Hardrick? Hardrick was a full-time employee of Brada. He was a regular employee of theirs before, during and after the lease. Except for an advance to the driver to cover expenses of the trip, the payment for the lease of the equipment with driver was made by Transamerican to Brada. Transamerican is not to pay the driver's salary, the lease providing that the entire cost of the operation should be Brada's. The lease provides that Brada will pay all of the federal or state withholding taxes, assessments, unemployment insurance, old age insurance, or other social security payments on Hardrick's wages or other earnings.

Brada apparently takes the position that the driver must be operating as an employee for either the lessor or the lessee but cannot be employed by both. The cases which Brada cites on this proposition do not support its position. Referring to the case of *Simmons v. King* (5th Cir. 1973), 478 F.2d 857, the court stated at page 867 that "* * * the I.C.C. carriers' liability

for equipment and drivers covered by leasing arrangements is not governed by the traditional common law doctrine of master servant relationships and respondeat superior." The court held that because of the lease and of the regulatory requirements the driver became the statutory employee of the lessee. The court however did not stop there. In addition to considering the relationship between the driver and the lessee, the court also held that the lessor could still be likewise liable and stated "This is not as incongruous as might be supposed. I.C.C. can mandate a positive legal responsibility which we uphold in the only way it would be meaningful—to give protection to the injured member of the public. At the same time (lessor) has, or may have, a practical control over (driver) of a kind which would not allow it to obtain an automatic insulation from liability from the mere terms of a lease between the two parties." *Simmons v. King, supra,* l.c. 867. To the same effect is *Carolina Casualty Insurance Company v. Transport Indemnity Company* (10th Cir. 1973), 488 F.2d 790, where the court held the driver to be a special employee of the lessee while he was a general employee of the lessor.

Brada cites the case of *Brannaker v. Transamerican,* (Mo. 1968), 428 S.W.2nd 524, in support of its position that only one employer can be liable for the acts of a servant. It is interesting to note that cited in the Brannaker case is the case of *Vance Trucking Company v. Canal Insurance Company,* D.C., 249 F. Supp. 33 (Affirmed 395 F.2d 391). The Vance case holds that in a case involving a lease of trucking equipment with a driver, the driver could be the employee of both the lessor and lessee and both could be liable for his acts.

Thus, it appears that Brada is mistaken as to its basic premise and in fact Brada could be liable to an injured third party for the acts of the driver while the truck was being operated under the lease.

Even so, the relationship between the parties is determined by the clear intent of the provisions of the lease agreement. While there is no doubt that by the terms of the regulations and by the terms of the lease agreement Hardrick was a statutory or special employee of Transamerican to the extent and for the purposes for which that relationship was created. It is also clear that Hardrick was a regular employee of Brada and that Transamerican entered into a lease agreement with Brada which provided for the lease of equipment as well as for the services of the driver. Transamerican paid Brada for a driver to drive the equipment as well as for the equipment itself. There is nothing inconsistent in referring to the driver as the lessor's employee and in requiring indemnity from the lessor for negligence of the driver employee of the lessor who was furnished by the lessor and for whose services the lessor has been paid. The language of the contract provides that as between Brada and Transamerican, the driver was to be considered Brada's employee.

ADDITIONAL AUTHORITIES

Two related cases have been decided since the filing of the briefs in this case and we cite these cases here to provide additional information for the Court.

Indiana Refrigerator Lines, Inc. v. Dalton, (6th Cir. 1975) 516 F.2d 795. The United States Court of Appeals for the Sixth Circuit in this case has followed its prior decisions and has upheld the validity of an indemnity agreement in a lease of equipment similar to that in our present case.

The United States Court of Appeals for the Seventh Circuit on August 11, 1975, decided the case of *Watkins Motor Lines, Inc. v. Zero Refrigerated Lines.* This case involved an indemnity agreement in an interchange agreement as distinguished from a trip lease such as is involved in our present case. The Watkins

case upheld the validity of the indemnity agreement. The Watkins case is not yet reported and the opinion is included as Appendix A to this Reply Brief.

CONCLUSION

Since the indemnity clause contained in the lease agreement between the parties was not in violation of the I.C.C. regulations, it is again respectfully submitted that the judgment below should be reversed and this case remanded for a trial on the merits.

Respectfully submitted

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APPENDIX

In the United States Court of Appeals for the Seventh Circuit

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Nos. 75-1183, 75-1184

Watkins Motor Lines, Inc., a Freight Corporation, The Insurance Company of North America, a Pennsylvania Corporation, and Waco Fire and Casualty Company, a Pennsylvania Corporation,

Plaintiffs-Appellants-Cross-Appellees,

v.

Zero Refrigerated Lines, a Texas Corporation,

Defendant-Appellee

and

Continental National Assurety Corporation, an Illinois Corporation; and Continental Casualty Company and Bankers and Shippers Company of New York,

Defendants-Appellees-Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Northern Division—
Nos. 73 C 1517, 74 C 2212
Richard B. Austin, *Judge*

Argued June 9, 1975—Decided August 11, 1975

Before Clark, *Associate Justice**, Bauer, *Circuit Judge* and Grant, *District Judge.***

Per Curiam:

This is a diversity action brought by appellant Watkins Motor Lines (Watkins) and its insurance carrier against appellee Zero Refrigerated Lines (Zero) and its insurance carriers, seeking indemnification for damages. On cross-motions for summary judgment, the United States District Court for the Northern District of Illinois found for Zero. We affirm.

In January, 1968, Watkins and Zero entered into an interline agreement for the interchange of equipment which provided for the interchange of traffic with one company's equipment along with the other company's routes. Up to April, 1974, there had been approximately 750 exchanges of equipment between Watkins and Zero, including those pursuant to a supplementary agreement in February of 1972. An indemnification contract was signed concurrently with the original interline agreement and was rewritten on June 2, 1971. This indemnification agreement was required by Zero before it would agree to interchange traffic and equipment with Watkins and provided that Watkins would hold Zero and its insurance underwriters "harmless of any liability in connection with the use and operation of automotive equipment" by Watkins over routes on which various motor carrier regulatory bodies had authorized Zero to operate.

In February of 1972, Watkins contracted to haul a shipment of Girl Scout cookies from Elizabeth, New Jersey, to Tucson, Arizona, and assigned one William Nixon to make the delivery. Previously, Watkins, which did not have sufficient equipment

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* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

** Senior Judge Robert A. Grant, United States District Court for the Northern Division of Indiana, is sitting by designation.

to handle all of its shipments, had entered into a long term lease with Nixon to make available his tractor trailer rig on a "trip lease" basis. The cookies were loaded onto Nixon's rig which bore the Watkins interchangeable name plate. Nixon and his co-driver, David Reynolds, left for Arizona on February 23, 1972 on a through bill of lading. Since Watkins' Certificate of Public Convenience permitted carriage of goods only as far as Dallas, Texas, the company arranged with Zero to have the truck continue from Dallas to Tucson under Zero's name, pursuant to the standing interline agreement. This was accomplished through the fiction of an equipment lease by which Zero "rented" the truck from Watkins for two days, receiving the fee for carrying the cookies from Dallas to Tucson but paying for the "rental" to Watkins. Upon its arrival in Dallas, Zero inspected the equipment, changed the Watkins nameplate to Zero's own, and signed the appropriate papers covering the "rental" of the equipment and drivers through to Tucson.

On February 28, 1972, a fatal traffic accident occurred in Tucson while the tractor trailer rig was being operated by Reynolds. As a result, a wrongful death action was filed against Watkins and Zero in Phoenix. It was later settled for $575,000 with the burden split by the respective insurance carriers as follows: $300,000 by Zero's and $275,000 by Watkins'. Subsequently Zero filed a suit in the U. S. District Court in the Eastern District of Pennsylvania seeking indemnity for the $300,000 which it paid. That action was transferred to Chicago and consolidated with a similar suit filed by Watkins against Zero which was then pending.

Watkins then filed a motion for summary judgment claiming that it was entitled to indemnity from Zero under the rule announced by this Circuit in *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972). The district court found *Alford* inapposite because the earlier case involved trip lease agreements under 49 C.F.R. §1057.4, while the present case dealt with an inter-

change of equipment under 49 C.F.R. §1057.5. The district court therefore entered a judgment against Watkins on its motion for summary judgment and for Zero on its counterclaim. A summary judgment against Watkins was entered for $300,000 in favor of Zero's insurers, Bankers and Shippers Company of New York ($100,000) and Continental Casualty Company ($200,000).

After this appeal was filed but before it was argued, the Supreme Court granted a writ of certiorari in *Transamerica Freight Lines v. Brada Miller Freight Systems*, No. 75-54. In that case, this circuit cited *Alford v. Major* in issuing an unpublished order striking down an indemnity clause in a lease of a tractor-trailer whereby the lessor agreed to hold the lessee harmless for any negligence of the lessors or its agents and to indemnify the lessee from any claims arising out of any injury sustained through any negligence of lessor or its agents or employees. It is not insignificant that three other circuit courts have handed down decisions conflicting with *Alford*. *See Jones Truck Lines, Inc.* v. *Ryder Truck Lines, Inc.*, 507 F.2d 100 (6th Cir. 1974); *Carolina Freight Carriers Corp.* v. *Pitt County Transportation Co.*, 492 F.2d 243 (4th Cir. 1974); *Allstate Insurance Co.* v. *Alterman Transport Lines, Inc.*, 465 F.2d 710 (5th Cir 1972).

Although it might be the better part of valor to hold this case pending the Supreme Court's examination of the *Alford* rationale in *Transamerica*, we have concluded that *Alford* is inapposite here, regardless of what the Court may do. *Alford*, as did *Transamerica*, *Jones Truck Lines*, *Carolina Freight Carriers*, and *Allstate Insurance*, dealt with a trip lease under 49 C.F.R. §1057.4, not an equipment exchange under §1057.5. This is significant because it is only within the former regulation that the requirement of "complete assumption of responsibility * * * by the lessee for the duration of said contract, lease or other arrangement." 49 C.F.R. §1057.4(a)(4).

When Watkins dealt with Zero, it was acting under §1057.5, which has no provision comparable to §1057.4(a)(4). The requirements for an equipment exchange under §1057.5 appear to have been met, and we perceive no bar to the indemnification agreed upon by the parties. It is true that it was Zero's certificate under which the shipment was moving at the time of the accident, but, as we view it, Watkins retained control of the equipment and, quite logically, retained responsibility for its use. If there is a public policy argument in this case, it lies with Zero, for to release Watkins from liability might encourage recklessness in driving on the part of the actual operators of trucking equipment. Since highway safety is one of the paramount goals of the regulations involved, it follows that the indemnity agreement serves a useful purpose and must be upheld.

Affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

Supreme Court, U. S.
F I L E D
MAY 19 1975
MICHAEL RODAK, JR., CLERK

No. 74-54

In the Supreme Court of the United States

OCTOBER TERM, 1974

TRANSAMERICAN FREIGHT LINES, INC., PETITIONER

v.

BRADA MILLER FREIGHT SYSTEMS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

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On October 15, 1974, the Court invited the Solicitor General to express the views of the United States. In response, the United States and the Interstate Commerce Commission filed a short memorandum supporting the petition for certiorari. Certiorari was granted on March 17, 1975. This brief elaborates upon the views expressed in our memorandum.

QUESTION PRESENTED

Whether 49 C.F.R. 1057.3(a)—which requires that regulated carriers, in order to lease equipment from another regulated carrier, must first agree "in writing that control and responsibility for the operation of

the equipment shall be that of the lessee"—prohibits the lessor from agreeing to indemnify the lessee for losses caused by the negligence of the lessor.

STATEMENT

Motor carriers with certificates of public convenience and necessity often lease equipment with which to carry the freight over their authorized routes. Such arrangements are governed by the Interstate Commerce Commission's equipment leasing regulations, 49 C.F.R. Part 1057. Part 1057 requires that control of and responsibility for the operation of the leased equipment must be assumed by the lessee under the certificate authorizing the operation.

On January 19, 1968, Brada Miller Freight Systems, Inc. ("Brada Miller") entered into a lease agreement with Transamerican Freight Lines, Inc. ("Transamerican"). Brada Miller, as lessor, provided the equipment and driver for a single trip from Detroit, Michigan to Kansas City, Missouri. Transamerican, the lessee, holds authority from the Commission to serve those points and the equipment was to be operated over Transamerican's route. The lease provided that Transamerican, during the term of the lease, would have control of the vehicle and would be responsible to the public and shippers for its operation.[1] The lease also provided that Brada Miller would indemnify Transamerican for any loss or expenses

[1] Paragraph 4 of the lease provides that Transamerican "shall have the control and responsibility for the operation of said equipment in respect to the public, shippers, and Interstate Commerce Commission * * *" (A. 16, Exh. 3).

"sustained by reason of any negligence or alleged negligence" on the part of Brada Miller or its employees, arising out of the operation of the equipment during the term of the lease.[2] The indemnification clause was in turn qualified by the proviso that Transamerican was fully responsible to the public for the operation of the leased equipment. For purposes of its motion for summary judgment Brada Miller conceded, as Transamerican alleged (Pet. App. A–4), that Transamerican had "complete control and responsibility for the tractor and trailer covered by the lease * * *." In short, the lease provided that as between Transamerican and Brada Miller, Brada Miller was responsible for its own negligence, but as between the public and Transamerican, Transamerican was responsible for Brada Miller's negligence as well as its own.

As the Commission's regulations required, Transamerican inspected the equipment before the trip and filed with the Commission a report indicating that the equipment was safe (A. 66–67, 89 (Temperley Dep. Exh. 2)). Transamerican also checked the medical report on Howard Hardrick, a driver employed by Brada Miller and furnished by Brada Miller for the trip (A. 75). There is no indication in the record that Hardrick was an unsafe driver.

During the trip Sandra Wear was injured when the leased vehicle struck her automobile. She filed suit against Transamerican and Brada Miller, alleging that the accident was caused by the negligence of the truck's driver (A. 5–6). Brada Miller and Trans-

[2] This clause is set out in full at pp. A–4 to A–5 of petitioner's brief.

american cross-claimed against each other. During the course of the trial, Transamerican and Sandra Wear settled their dispute for $80,000. Transamerican then amended its cross-claim against Brada Miller, seeking recovery of the amount paid in settlement and of the expenses incurred in defending the suit.[3]

The district court granted Brada Miller's motion for summary judgment. Following *Alford* v. *Major*, 470 F. 2d 132 (C.A. 7), it held that the indemnity clause violates the Commission's regulations requiring the lessee to assume full control and responsibility over the leased vehicle.[4]

Transamerican argued on appeal that under the lease it had assumed full control and responsibility for the operation of the tractor and trailer. The court of appeals concluded, however, that "control and cost bearing are * * * related" (Pet. App. A–12), so that the party bearing the costs is the party with control

[3] Diversity of citizenship remained after the settlement. Transamerican is incorporated and has its principal place of business in Michigan; Brada Miller is incorporated and has its principal place of business in Indiana.

[4] The district court concluded (Pet. App. A–3 to A–4) that the lease was governed by 49 C.F.R. 1057.4(a)(4), which specifies that a lease must "provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee * * *." Section 1057.3(a), not Section 1057.4(a)(4), is the applicable provision in this case because Transamerican leased the equipment from another authorized carrier. Section 1057.3(a) provides that the carriers must agree "in writing that control and responsibility for the operation of the equipment shall be that of the lessee * * *."

However, there is no difference in substance in the "control and responsibility" requirements of the two sections. Section 1057.3 merely exempts certain leases from requirements of Section 1057.4 not relevant to indemnification.

and responsibility. Because Brada Miller had agreed to bear the costs of its own negligence, the court below held, Brada Miller rather than Transamerican had assumed control and responsibility. The court therefore held that the indemnification clause was ineffective.

ARGUMENT

INTRODUCTION AND SUMMARY

1. Because of seasonal or day-to-day fluctuations in the demand for its services, a motor carrier may find itself without equipment adequate to enable it to operate to the full extent of its authority, or to transport particular freight offered by shippers. At the same time, certificated carriers, exempted carriers, private carriers and contract carriers may have surplus equipment that, if not used by another carrier, will stand idle or be returned to its origin without a revenue-producing load.[5] It is economically advantageous for these carriers to strike a bargain; one

[5] Exempt carriers (usually transporters of agricultural commodities) often transport their goods from the area of production to the market, but are unable to secure exempt traffic to return to their origin. Unless the vehicle is leased to a certificated carrier, it will be compelled to travel empty in one direction, with a concomitant waste of resources. Agricultural carriers also face severe seasonal fluctuations in the demand for their services, and their equipment might go unused for many months each year unless it could be leased to other carriers. Private carriers (firms providing their own transportation) and contract carriers (firms providing service under long-term contracts to particular shippers only) often encounter similar problems. See *Red Ball Motor Freight, Inc.* v. *Shannon*, 377 U.S. 311. A contract carrier also may desire temporarily to augment its equipment. Its leasing, too, is governed by 49 C.F.R. Part 1057.

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carrier secures additional equipment with which to serve the shipping public, and the other carrier avoids the inconvenience and cost of idle equipment or the return of its equipment (and driver) to the origin without a shipment.

Although leases of equipment therefore are advantageous to the establishment and maintenance of an orderly and economical system of transportation, "leases" of operating authority are not. Under the Motor Carrier Act of 1935, 49 Stat. 543, as amended, 49 U.S.C. 301–327, only a properly certificated carrier may haul freight in interstate commerce. Each certificate carries limitations on routes, destinations, and classes of freight to be hauled. There is an important distinction between a lease of equipment from a lessor to a lessee, on the one hand, and an ostensible equipment lease in which a "lessee" with operating authority simply lends its name and certificate to a "lessor" that actually performs the transportation service.

Leases of operating authority would subvert many of the restrictions on operation required by the Motor Carrier Act and included in certificates of public convenience and necessity.[6] The Commission's control and

[6] A carrier is limited to specific types of goods carried over specified routes to designated locations, and may be limited to enumerated customers. See, *e.g.*, *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554 (stock in trade of drug stores); *Kreider Truck Service, Inc., Extension—Lard Oils*, 82 M.C.C. 565 (lard and lard oils in tank vehicles from East St. Louis, Missouri, to Memphis, Tennessee); 49 U.S.C. 308(a). If operating authority could be leased, firms could (by careful planning and cross-leasing) acquire each other's authority and become common carriers in fact.

responsibility regulations have been designed to prevent the lease of operating authority in the guise of a lease of equipment. In order to achieve this objective, these regulations require the lessee to ship the freight under its own bill of lading, to compensate the lessor on an established basis, to inspect the equipment, and to assume full control over and responsibility for the operation of the leased equipment.[7]

2. The Commission's control and responsibility regulations do not, however, require the lessee to operate the equipment itself. The lessor can perform that task by furnishing the driver as well as the equipment. Under the regulations and the Commission's decisions interpreting them the lessee must assume the responsibility for the shipment, and must have full authority to control that shipment. Subject to that authority and responsibility, however, it can allow the lessor to perform the ministerial tasks of moving the freight.

The Commission's regulations do not expressly prohibit indemnification clauses. The merits of indemnification have not been investigated by the Commission, and its "control and responsibility" regulations neither sanction nor forbid the practice. Just as mere

[7] 49 C.F.R. 1057.3(a) provides that when one authorized motor common carrier leases equipment to another, for transportation in the direction of a point the lessor is authorized to serve, most of these requirements (but not the inspection and control and responsibility requirements) do not apply.

The regulations also govern the permissible duration of leases. The duration and fixed rate provisions do not apply to certain exempted lessors. See 49 U.S.C. 304(f); 49 C.F.R. 1057.4(a)(3).

performance by the lessor of the physical operation of the leased equipment does not negate the lessee's "control and responsibility," a mere promise by the lessor to bear the costs of its own negligence does not offend the regulations. The indemnification clause does not, by itself, determine what tasks the lessor performs or who has the authority to control those tasks or who bears responsibility to the public if the tasks are not performed properly. These of course are questions of control and responsibility, rather than of the allocation of formal liability between the contracting parties, and are the primary focus of the Commission's regulations.

This does not mean, however, that indemnification agreements always are permissible under the regulations. Such agreements may be part of an overall arrangement between "lessor" and "lessee" that amounts to an illegal lease of operating authority rather than a legitimate lease of equipment. An indemnification clause might tip the balance and lead the Commission to conclude that the ostensible "lessor" of equipment in fact had assumed the role of providing unauthorized transportation services. But an indemnification clause, in and of itself, does not violate the Commission's control and responsibility regulations.

3. Although the principal purpose of the regulations pertaining to leased equipment was to prevent illegal leases of operating authority to the "lessors" of the equipment, the Commission also considered the implications of its regulations for the safe operation of the trucking industry. The inspection requirement of Section 1057.4(c) is addressed in part to an apprehen-

sion that lessors might furnish equipment less reliable than that of the certificated lessee. The regulations express a similar concern with respect to drivers (see 49 C.F.R. 1057.4(e)). And, of course, the requirement that the lessee assume control and responsibility is intended to ensure that a party directly answerable to the Commission is in charge of the operation.

The Bureau of Motor Carrier Safety of the Department of Transportation also is charged with assuring safety in motor transportation, and is concerned with the problems of unsafe equipment. The Bureau and the Commission agree, however, that the Commission's regulations are not directly concerned with, and neither condone nor forbid, indemnification agreements.

Even had the Commission specifically addressed the propriety of indemnification, it is by no means clear that it would have sought to prohibit the practice in all cases. Under certain circumstances an indemnification clause might help to induce the lessor properly to perform the ministerial tasks that, under the regulations, can be assigned to it. If it is responsible for the consequences of its own negligence, the lessor might well be more likely to exercise due care. In short, an indemnification clause might help the lessee influence the performance of the lessor, and thereby exercise control and responsibility over a lessor in physical control of the vehicle.

On the other hand, the objective of safe operation might be frustrated if the indemnification clause also required the lessor to indemnify the lessee for the lessee' negligence, but the clause in this case does

not do so. Transamerican, the lessee, therefore had ample incentive to perform a thorough inspection and undertake all of its other duties with due care. It may be that if Transamerican negligently inspected the vehicle or negligently permitted an unsafe driver (furnished by the lessor, Brada Miller) to drive it, Transamerican would be precluded by the Commission's regulations, by the indemnification clause itself, or by state common law, from recovering over against Brada Miller. But such a case is not presented here. As written, the indemnification clause does not so diminish Transamerican's incentives to provide safe transportation that the clause is invalid for that reason.

I

THE COMMISSION'S CONTROL AND RESPONSIBILITY RULES ORDINARILY PERMIT INDEMNIFICATION CLAUSES SO LONG AS THE LESSEE RETAINS ULTIMATE CONTROL AND RESPONSIBILITY TO THE SHIPPERS AND THE PUBLIC

As the foregoing introduction and summary indicates, this case requires the Court to interpret the "control and responsibility" requirements of the Interstate Commerce Commission's motor carrier equipment leasing regulations. The Court of Appeals for the Seventh Circuit (following its earlier decision in *Alford* v. *Major,* 470 F.2d 132) concluded that the Commission's regulations implicitly prohibit all agreements requiring one motor carrier to indemnify another for loss caused by the former.[8] Courts of ap-

[8] See also *Denver Midwest Motor Freight, Inc.* v. *Busboom Trucking, Inc.*, 190 Neb. 231, 207 N.W. 2d 368. The opinion below expressly states (Pet. App. A–10 to A–13) that *Alford* prohibits all indemnification clauses. One district judge in the Seventh Circuit, apparently unaware of the unpublished opinion below, has held in two cases that *Alford* permits indemnification agreements. See *Watkins Motor Lines, Inc.* v. *Zero Refrigerated Lines*, 381 F. Supp. 363 (N.D. Ill.) (interchange of equipment); *General Express., Inc.* v. *Schreiber Freight Lines, Inc.*, 377 F. Supp. 1159 (N.D. Ill.) (trip lease).

peals for four other circuits have reached the opposite conclusion. *Indiana Insurance Co.* v. *Parr Trucking Service, Inc.,* 510 F.2d 490, 493–494 (C.A. 6); *Jones Truck Lines, Inc.* v. *Ryder Truck Lines, Inc.,* 507 F.2d 100 (C.A. 6), petition for a writ of certiorari pending, No. 74–973; *Carolina Freight Carriers Corp.* v. *Pitt County Transportation Co.,* 492 F.2d 243 (C.A. 4), petition for a writ of certiorari pending, No. 73–1750; *Carolina Casualty Insurance Co.* v. *Transport Indemnity Co.,* 488 F.2d 790, 794 (C.A. 10) (by implication); *Allstate Insurance Co.* v. *Alterman Transport Lines, Inc.,* 465 F.2d 710 (C.A. 5).

A. The Control and Responsibility Rules Are Designed To Prevent the Illegal Leasing of Operating Authority

The equipment leasing regulations under consideration here were formulated in Ex Parte No. MC–43, a rule-making proceeding extending from 1950 to 1956. See 51 M.C.C. 461; 52 M.C.C. 675; 64 M.C.C. 361; 68 M.C.C. 553. The first formulation was considered by this Court and sustained in *American Trucking Associations, Inc.* v. *United States,* 344 U.S. 298.

This rule-making proceeding was addressed primarily to problems caused by single-trip leasing of vehicles by owner-operators. These owner-operators,

who held no interstate transportation authority and therefore were outside the jurisdiction of the Commission, often entered into arrangements with certificated carriers through which the carrier agreed, in effect, to lease its certificate to the owner-operator for a fixed percentage of the rate collected. Owner-operators would solicit business in their own names[9] (or sometimes, without informing them in advance, in the names of certificated carriers). The owner-operators would issue a bill of lading to the shipper and write a document in the form of a "lease." After completing the transportation, the owner-operator would remit to the certificated carrier a fixed percentage of the revenue and a copy of the "lease"; until that point the certificated carrier might know nothing of the arrangement. If an accident took place en route, or if the cargo were lost, the certificated carrier might (and often did) disclaim responsibility for the transportation taking place without its prior knowledge.

Using this trip-leasing device, the lessors evaded the Motor Carrier Act and Commission's rules, which comprehensively regulate which carriers are allowed to transport specific types of freight over established routes to particular destinations. Because many of the "trip leases" were arranged without the prior knowledge of the certificated carrier, it also was difficult to fix responsibility for noncompliance with particular directives or, when responsibility could be fixed, to

[9] Since owner-operators often completed the entire journey under their own names, injured or interested parties had some difficulty discovering the identity of the nominally responsible certificated carrier.

obtain compliance. As the Commission explained in *Performance of Motor Common Carrier Service by Riss & Co., Inc.*, 48 M.C.C. 327, 360:

> In any case of a person claiming to be a motor carrier through the use of the vehicles of others, it is of the utmost importance to regulation that it have and exercise direction and control of the operations and of the persons engaged therein. For otherwise an unworkable situation is created, that is, one, for example, in which neither the Commission nor the person claiming to be the carrier would have any immediate and direct control over safety, hours of service of employees, and other matters pertaining to safe, adequate, and efficient service, and the safe operation of vehicles on the highways, all of which were intended by the act. In other words, as to these important features of motor-carrier operation, our regulation thereof, as required by the act, would be negatived to an inoperative degree, as the actual operator would not be subject to our regulations or to the direction and control of the person claiming to be the carrier and subject to our jurisdiction.

In Ex Parte No. MC–43 the Commission formulated several rules that alleviated the problems associated with uncontrolled trip-leasing by unregulated owner-operators. The cornerstone of the remedy the Commission devised is a rule that all leases in which the lessor furnishes the driver must extend for a period of at least 30 days.[10] By setting a minimum duration

[10] There are a few exceptions for agricultural and other carriers often faced with empty back-hauls from permissible travel. See notes 5 and 7, *supra*.

for such leases, this rule eliminated the "hard core of the problem[,] * * * the owner-operator trip lease" (68 M.C.C. at 555). The Commission also provided that the lease must be in writing and negotiated in advance; that the equipment must be identified as that of the lessee, with a concomitant assumption of liability for damage; that the lease must provide for payment at a specified rate; that the lessee must conduct a safety inspection before taking possession of the equipment; and that the lease must expressly provide that complete control and responsibility for the operation of the equipment rests with the lessee. See 49 C.F.R. 1057.4.

When the lease involves two certificated carriers, as is the situation in this case, an owner-operator trip lease is not possible,[11] and Section 1057.3(a) therefore removes most of the requirements of Section 1057.4. However, although the 30-day minimum lease does not apply to such transactions, the inspection requirement, and the control and responsibility requirement, continue to apply.

B. Indemnification Clauses Do Not Negate the Lessee's Control and Responsibility

The Commission's regulations do not refer to indemnification clauses, and the question presented in this case—whether the presence of such a clause conflicts with a separate agreement in the lease that the

[11] "Owner-operator," as used by the Commission in Ex Parte No. MC-43, is a term of art that does not include regulated carriers, which, because they are directly subject to the Commission's authority, do not pose the problems associated with transient owner-drivers.

lessee will exercise full control and responsibility—was not directly addressed in Ex Parte No. MC-43.[12] The Commission submits that such clauses are not necessarily inconsistent with the lessee's assumption of full control and responsibility.

In this case the lease expressly provided that the lessee (Transamerican) would assume and exercise complete control over and responsibility for the operation of the leased vehicle. This is, at least formally, all that Section 1057.3(a) requires. Perhaps more important than the mere words assuming control and responsibility, however, is the lessee's express assumption of liability to the public and shippers for any harm or loss caused by the operation of the leased vehicle; the indemnity clause did not affect this responsibility, and dealt only with the relationship between the lessor and lessee themselves.

The Commission contemplated that allocations of operational control would occur between the contract-

[12] During the course of Ex Parte No. MC-43, some witnesses testified about the effects of indemnification of lessees by owner-operators. The Commission stated (52 M.C.C. at 690):

"Protection of the public through insurance is reduced, because certain carriers require owner-operators to bear a portion of the public-liability and property-damage insurance, and, in some instances, to assume part of the responsibility for cargo insurance and pay a portion of each loss and damage claim."

This comment has no bearing on indemnification agreements of the type presented in this case; it concerned only carriers that attempt to disclaim responsibility to the public for damage or injury. Such a disclaimer substantially negates the lessee's control and responsibility. The Commission did not discuss arrangements that, while acknowledging the lessee's liability to the public and shippers, allocate the burden between lessee and lessor.

ing parties. The regulations do not preclude lessors from providing the drivers of the leased vehicles. The provision of a driver, more than any other single act, leaves physical moment-to-moment "control" of the leased vehicle in the hands of the lessor. But this sort of control is control over ministerial tasks. It is not the "control and responsibility" with which the Commission was concerned in Ex Parte No. MC–43. The Commission's regulations prohibit the lessor from retaining control over the route and destination of the freight, and require that the operation be conducted under the lessee's name. They prohibit essentially ad-hoc arrangements that allow the "lessor," under the guise of leasing equipment to a certificated carrier, to perform the functions (solicitation of business, scheduling, and so on) of a common carrier. But the regulations do not prohibit the lessor from carrying out the tasks immediately related to the physical transportation of the freight.

As the Commission stated (52 M.C.C. at 681):

> * * * when an authorized carrier furnishes service in vehicles owned and operated by others, he must control the service to the same extent as if he owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the shipper, the public, and this Commission for the transportation.

Thus, the lessee must control the "service" completely, but need control the "vehicles" only to the extent necessary to be "responsible" to the shipper, the public, and the Commission.[13] Of course, this responsibility is

[13] See 49 U.S.C. 315 (certificated carriers must be financially responsible and post a bond or provide insurance to cover po-

not limited to the satisfaction of damage claims; the lessee (under whose control the service is provided) must take all reasonable steps to ensure that the entire operation is conducted safely. An indemnification clause is not, however, inconsistent with this scheme. It does not affect the "service" or ultimate responsibility to the public, the shippers, and the Commission, but relates more directly to those aspects of the operation of the vehicle that often are within the physical control of the lessor.

On several occasions since the conclusion of proceedings in Ex Parte No. MC–43, the Commission has applied the rules to concrete factual situations. It has twice considered an indemnification clause as one element among many demonstrating lack of control and responsibility, but it has never condemned such a clause in isolation. In *Tanksley Transfer Co. Extension—Points in Four States,* 110 M.C.C. 674, 678–679, a "lessor" took orders directly from shippers and picked up freight in its own name, was compensated by a division of the revenues rather than by a fixed rental, and shifted equipment indiscriminately between the "lessee's" use and its own. This combination of factors almost certainly would have led the Commission to conclude that the lessee was not exercising control and responsibility. The Commission remarked, in addition, that the lessor had agreed to

tential liability). Cf. *Mellon National Bank & Trust Co.* v. *Sophie Lines, Inc.*, 289 F. 2d 473 (C.A. 3) (the lessee is liable for the negligent operation of leased vehicles); *Wellman* v. *Liberty Mutual Insurance Co.*, 496 F. 2d 131 (C.A. 8) (lessee is responsible for operation of a leased vehicle, even when the operation violates the lease).

indemnify the lessee for any loss, and that the indemnity agreement reinforced the Commission's conclusion that the lessor was in complete control of the service offered. Similarly, in *Diamond Transportation System, Inc., Extension—Wisconsin and Oklahoma Origins,* 117 M.C.C. 706, 712–713, the Commission concluded that the "lessee" had shunned the requisite control and responsibility because the "lessor" conducted equipment inspections in the "lessee's" name, shipped goods under its own bill of lading and concluded a "lease" agreement only after the shipment was completed, and was compensated by a division of the revenues. As in *Tanksley,* an indemnification agreement was part of this pattern of conduct, which appeared to make the "lessee" a passive party doing no more than lending its certificate to transportation services performed entirely by the "lessor." *Diamond, Tanksley,* and all other cases considered by the Commission depended upon the cumulative effect of all of the circumstances. The regulations are not violated when, as here, the only circumstance tending to show lack of control is the indemnification agreement itself.[14]

[14] Although the Commission often has occasion to address the issue of compliance with its leasing regulations, neither party to this case has suggested that this determination is always within the primary jurisdiction of the Commission. Nor do we believe that such a contention would be correct.

Cases like the instant one arise out of ordinary tort actions in which one party, relying upon the contractual indemnity provision, impleads or cross-claims against another (or later brings a separate suit to recover over from the lessor). Similar tort and contract questions are traditionally resolved by courts. The Commission—by promulgating the regulations and through continuing proceedings before it—already has exercised its judgment and discretion under the Act. Once it has done so, it is properly a judicial task to apply the Commission's regulations and precedents to the concrete case before the court. See *S. W. Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411, 420–421; *United States* v. *Western Pacific R.R. Co.*, 352 U.S. 59, 69; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695, 707; *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291, 294.

Finally, we note that indemnity is commonly recognized in the law of torts, and often is available even in the absence of an express contractual agreement. If one of the lessee's drivers is at the controls of a truck, the lessee might be able to receive indemnity from that driver for any damage caused by the driver's negligence. Cf. *Schlagenhauf* v. *Holder,* 379 U.S. 104. When the lessee is a certificated carrier, this type of indemnity is neither more nor less in derogation of its "control and responsibility" than is a right of indemnity from the lessor who furnished the driver. See generally Prosser, *Handbook of the Law of Torts* 310–313 (4th ed. 1971).

The law of admiralty serves as a further example. The vessel (or its owner) owes the seamen an absolute duty to furnish seaworthy working conditions, and this duty, like the common carrier's duty to the public and its shippers, is not delegable. *Reed* v. *The Yaka,* 373 U.S. 410, 414–415. But if the unseaworthiness is caused by a third party, such as a stevedore, the vessel's owner can seek indemnity from that third party even in the absence of an agreement so providing. *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.,* 350 U.S. 124; *Weyerhaeuser Steamship Co.* v.

Nacirema Operating Co., 355 U.S. 563. As the Court observed in *Ryan*, an express indemnification clause would, of course, have been permissible (350 U.S. at 132).[15]

The principle is the same in both admiralty and motor transportation: although one party (the vessel's owner or the certificated carrier) is by law required to be fully in control of and responsible for conditions of the vessel or the vehicle, and bear all consequences of unseaworthiness or negligence, the party responsible in law may seek indemnity from the party responsible in fact. The indemnity clause would violate the Commission's rules only if accompanied by other indicia demonstrating that the lessor was in control of the "service" as well as of the physical operation of the vehicle.

II

INDEMNIFICATION CLAUSES DO NOT CONFLICT WITH THE REGULATIONS' PROVISION FOR SAFE OPERATIONS

At the time it considered and promulgated the motor carrier equipment leasing regulations, the Commission's predominant concern was the prevention of leases of operating authority under the guise of leases of equipment. One of the reasons that the Commission disapproved of such "leases" was its belief

[15] *Ryan* was partially abrogated by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 86 Stat. 1263, 33 U.S.C. (Supp. II) 905. The amendments substitute a system of workers' compensation for a longshoreman's action against the vessel and the vessel's indemnity action against the stevedore. The amendments do not affect the law of indemnity except as it applied to longshoremen.

that leased equipment was not being operated in accordance with applicable safety regulations. See *American Trucking Associations, supra,* 344 U.S. at 305; Ex Parte No. MC–43, 52 M.C.C. at 686–696. As the district court observed in *Alford* v. *Major,* 314 F. Supp. 979, 983 (N.D. Ind.), affirmed, 470 F.2d 132 (C.A. 7), "[t]he Interstate Commerce Act [*sic*] was supposed to prevent accidents, as well as to provide financially responsible defendants in the event of their occurrence."

The Commission's regulations respond to both concerns. The lessee must inspect the vehicle in order to ensure that it is in safe operating condition (Section 1057.4(c)) and must make certain that the driver is familiar with applicable safety regulations (Section 1057.4(e)). The lessee, because it is charged with control and responsibility, is responsible to the public and shippers for any property damage or personal injury arising out of the operation of the leased vehicle (see note 13, *supra*), and it must carry adequate insurance, or make other provision for payment, whether or not it has recourse to the lessor (49 U.S.C. 315).[16]

The regulations do not refer to indemnification clauses. Each of the regulations applies whether or not the lease agreement contains an indemnification agreement, and the lessee can comply fully with each provision even though it seeks recourse against the

[16] The requirement that the lease be of a minimum of 30 days' duration (applicable to many leasing situations, although not to leases between certificated carriers) also promotes safe operation. Unlike the situation presented by a single-trip lease, the 30-day lease gives the lessee time to become acquainted with the maintenance requirements, if any, of particular vehicles.

lessor. The Commission therefore submits that, so long as the lessee has complied with each of the provisions of the regulations, it is in conformity with them even though it has contracted for indemnification.

The United States, which (through the Bureau of Motor Carrier Safety of the Department of Transportation)[17] is responsible for the enforcement of safety rules for the nation's transportation system, believes that appropriately drafted regulations of indemnification clauses would be desirable as a matter of public policy. Such regulations might provide the lessee with greater incentives to demand that the lessor furnish safe equipment and drivers, and, in response to such demands, would cause the lessors to repair equipment and institute additional safety maintenance programs in order to compete for leases. However, the United States agrees with the Commission that the Commission's present regulations are not addressed to, and neither forbid nor regulate the terms of, indemnity clauses.

The United States and the Commission also agree that a prohibition of indemnification might reduce the lessor's incentive to exercise due care and provide safe equipment under some circumstances. When the

[17] The Commission's duties relating to motor carrier safety were transferred to the Department of Transportation by Section 6(e) of the Department of Transportation Act, 80 Stat. 939, 49 U.S.C. 1655(e), and have been delegated to the Bureau of Motor Carrier Safety of the Federal Highway Administration by 49 C.F.R. 1.48 and 389.4. Although the Bureau has the power to enforce the safety rules, the Commission retains the power to make those rules. See 49 U.S.C. 304(e).

lessor is ultimately responsible for making whole any loss caused by unsafe equipment or its negligence, it can be expected to take any appropriate cost-justified safety precautions. It can attempt to reduce its potential liability by increasing its investment in safety.[18] The lessor may sometimes be in the better position to inspect the vehicle, note its deficiencies and safety needs over the long run, and engage in preventive maintenance necessary to assure an adequate level of safety (and hence lower payments in indemnification or insurance costs). The lessor can be expected to provide a safe driver since the lessor will be in a better position to detect and replace chronically unsafe drivers. To the extent that the prospect of ultimate liability produces greater care in operation, the

[18] See generally Comment, *Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule*, 40 U. Chi. L. Rev. 661 (1973), which advocates a system of joint liability. If both the lessor (an independent contractor) and the lessee are liable for harm caused by the independent contractor, the public will be more likely to recover because it will have two responsible parties. The lessor and lessee then are free to shift the ultimate liability between them by indemnification agreements; if the lessor can provide more safety at lower cost, the lessee will pay it to do so (by increasing the rental) and will receive an indemnification agreement in return. On the other hand, if the lessee is better able to provide for safe operation (for example, by inspecting the vehicles more rigorously), the lessor will "pay" it to do so by accepting a lower rental and by demanding an indemnification clause from the lessee. This allocation of ultimate liability to the most efficient accident-preventer is possible only so long as indemnification clauses are permitted. See also Coase, *The Problem of Social Cost*, 3 J. Law & Economics 1 (1960); Demsetz, *When Does the Rule of Liability Matter?*, 1 J. Legal Studies 13 (1972).

ultimate liability should rest with the lessor, as the marketplace has so assigned it in this case.

The usefulness of indemnification agreements, and the contribution they may (or may not) make to safe operation, will depend upon the type of leasing operation involved. When the driver is supplied by the lessor and the clause covers only the lessor's negligence, the case for indemnification is the strongest; when the lease is long term (so that the lessee will have full physical control of the vehicle), the lessee supplies its own driver, and the clause requires indemnification for the lessee's own negligence, the case is weakest. Appropriately drafted regulations might preclude the use of such clauses when they do not contribute to safe operation. It may be, on complete examination, that the Commission would conclude that indemnification should be regulated or totally forbidden. But it has not addressed the issue, and the regulations as written are not susceptible of distinctions among types of indemnification. A decision that the indemnity clause in this case is contrary to the Commission's regulations could have the effect of nullifying all indemnity clauses in all motor carrier leases.

We submit that the present regulations cannot be so interpreted. Although, when accompanied by other indications that the equipment lease is a sham, an indemnification agreement provides some evidence that the lessee has assumed less than the requisite amount of responsibility and control, an indemnification agreement standing by itself does not conflict with 49

C.F.R. Part 1057. The language and history of the regulations militate against an inference that the Commission intended to void indemnification agreements.[19]

[19] The law of every state permits indemnification agreements, although in some states it is illegal to agree to indemnify another party for the other's negligence. In most states it is illegal to agree to indemnify another for the other's intentional torts. See generally ALI, *Restatement of Contracts* §§ 572–575 (1933); 6A Corbin, *Contracts* § 1471 (1962).

In *Chicago, Rock Island & Pacific R.R. Co.* v. *Chicago, Burlington & Quincy R.R. Co.*, 437 F.2d 6, 10, certiorari denied, 402 U.S. 996, the Court of Appeals for the Seventh Circuit enforced an indemnification provision through which the Burlington recovered from the Rock Island for losses incurred on the Burlington's track and caused by the Burlington's faulty switching signal system. The court held that the indemnification agreement "represented an adjustment of the private relations between the two carriers but did not alter their duties to the public as common carriers."

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed.

Respectfully submitted.

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